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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 603

[illegible] IOWA HYDRO-ELECTRIC COOPERATIVE, PETITIONER,

vs.

FEDERAL POWER COMMISSION, ET AL.

[illegible] TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[illegible] CERTIORARI FILED NOVEMBER 26, 1945.

[illegible] CERTIORARI GRANTED JANUARY 7, 1946.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 603

FIRST IOWA HYDRO ELECTRIC COOPERATIVE, PETITIONER,

vs.

FEDERAL POWER COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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[fol. 1]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Case No. 8752

FIRST IOWA HYDRO-ELECTRIC CO-OPERATIVE, Petitioner,

v.

FEDERAL POWER COMMISSION, Respondent

Joint Appendix

BEFORE THE FEDERAL POWER COMMISSION

APPLICATION FOR LICENSE

Project No. 1853

1. The First Iowa Hydro Electric Cooperative, a non-profit cooperative association, organized under the laws of the State of Iowa and having its office and principal place of business at 215 Hershey Building, Muscatine, in the state of Iowa, hereby makes application to the Federal Power Commission for a license to authorize the construction, operation, and maintenance of certain project works fully described herein.

2. The name, title, and post-office address of the person to whom correspondence in regard to the application shall be addressed is as follows:

H. J. Strong, Secretary, 1011 E. High Street, Davenport, Iowa.

3. The applicant is a corporation and is organized under the following laws:

Chapter 390-G-1 Iowa Code 1935.

Section 8341 Iowa Code 1935 to such extent as is not inconsistent with Chapter 390-G-1 Iowa Code 1935.

Such powers, rights and privileges as are granted bodies corporate under Chapters 363, 364, 365 and 366 Iowa Code 1935.

All more fully detailed in applicant's Articles of Incorporation attached hereto and marked Exhibit "A".

[fol. 2] 4. The measure of control or ownership exercised by the applicant in any other organization is as follows:

None.

5. The applicant operates and or proposes to operate in the following states:

Iowa, Illinois.

6. The following is a general description of the proposed project:

(a) An earthen dam is to be constructed in Sections 12, 11, 2 and 3 of Township 77 N, R 3 W, and 25, 26, 35, Township 78 N, R 3 W, of the 5th P. M., Muscatine County, State of Iowa, across the Cedar River. A primary reservior of approximately 11,000 land acres will thus be created. Two smaller reservoirs, having areas of 920 and 160 acres shall be created by the canal structure and intake dam in Sections 12, 13, 14, 15, 23 and 24 of Township 77 N, R 2 W, and Sections 7, 17, 18, 19, 20, 29, and 30, Township 77 N, R 1 W, of the 5th P. M., Muscatine County, State of Iowa.

(b) A diversion canal shall extend from the primary reservior commencing, approximately, near the South West corner of Section 6, Township 77 N, R 2 W, of the 5th P. M., and thence South East to a point on the Mississippi River above Muscatine, Iowa, at the mouth of Geneva Creek.

(c) Intake and dam structure shall be located at the bluff about 1,700 feet from the Mississippi River Bank. Tailrace will be hewn through rock so as to lead the discharged water from the outlet of the draft tubes, to the Mississippi River. Power House shall have an initial installed capacity of approximately 50,000 kilowatts.

[fol. 3] (d) Pumping units shall be utilized to draw water from the Mississippi River through the tailrace and up into the two head bays back of the power intake dam. Canal gates will be installed at the head of the canal so that the maximum head may be obtained in the head bays. 20,000 kw. standby energy will be required during off peak hours to supply these pumping units. By means of this off peak pump shortage, it will be possible to raise the firm capacity of the installation to 18,000 kw.

(e) Transmission lines for interconnection with a source of steam standby current will extend from the power house

to the nearest source of energy, tentatively, near the City of Davenport, Iowa.

7. The location of the project applied for is as follows:

(a) The State of Iowa.

(b) In the Counties of Muscatine and Cedar.

(c) On the following named stream, Cedar River, having carried commerce to St. Louis, Missouri and other interstate transportation.

(d) In the region of the following named Cities and Towns:

Approximately 6½ miles northwest of Muscatine, Iowa; 25 miles south and west of Davenport, Iowa, Rock Island and Moline, Illinois and the government manufacturing arsenal, Rock Island, Illinois; 60 miles north and east of Burlington, Iowa; 50 miles S. E. of Cedar Rapids, Iowa; 24 miles south and east of Iowa City, Iowa.

Close to existing R. E. A. cooperative transmission lines extending from the approximate site of the proposed project to nine (9) counties in the State of Iowa.

[fol. 4] 8. The following lands of the United States will be affected by the project:

Two (2) small islands situated in the Cedar River approximately 5½ and 6½ miles respectively, above the proposed dam site and within the storage lake area—Lot 4, Sec. 6 and Lot 7, Sec. 8, T 78 N., R. 2 W., 5th Principal Meridian, Iowa.

These are vacant public lands according to the records of the General Land Office and are included in Power Site Classification No. 321, dated December 5th, 1940.

9. The proposed scheme of development of the project is as follows:

50,000 kw. capacity of generating units are to be installed, operating at an average head of 93½ feet of water. It is expected that the system will operate at a minimum load factor of 36% or at an average kw. load of 18,000. Pumped storage, together with the purchase of off-peak energy will be utilized to firm up the energy generated as a result of the stream flow.

The following is a tabulation of the expected operating results:

Power available 90 to 100% of the time, utilizing pumped storage and reservior storage	=	18,000 kw.
Power available 90 to 100% of the time, utilizing lake storage only (no pumped storage)	=	5,220 kw.
Proposed initial capacity	=	50,000 kw.
Proposed ultimate capacity (including Rochester Dam and Powerhouse)	=	100,000 kw.
Load factor on System	=	36%

[fol. 5] Energy Transactions

Average Year

Firm yearly output (at 18,000 kw. firm capacity)	=	158,000,000 kwh.
Portion of firm output delivered off-peak hours	=	30%
Yearly kwh. delivered during off-peak hours	=	47,500,000 kwh.
In 33 years total deficiency to make up 158,000,000 kwh. per year (from Hydrograph)	=	1,246,780,000 kwh.
Off-peak portion of deficiency	=	1,071,200,000 kwh.
Average off-peak deficiency per year	=	32,500,000 kwh.
Balance of deficiency to be supplied by pumping in 33 years	=	175,580,000 kwh.
Average yearly deficiency to be supplied by pumping	=	5,300,000 kwh.
Average energy purchases required for pumping (1.6 x deficiency)	=	8,500,000 kwh.
Total Average Energy Purchases	=	41,000,000 kwh.

Minimum Year

Deficiency in firm energy	=	100,900,000 kwh.
Supplied directly as off-peak energy	=	47,500,000 kwh.
Balance of deficiency by pumping	=	53,400,000 kwh.
Purchases required (1.6 x deficiency)	=	85,440,000 kwh.
Total off-Peak Energy Purchased	=	132,940,000 kwh.

[fol. 6] On the basis of the above tabulation it is evident that it is possible to produce 158,000,000 kwh. of firm energy annually as a result of:

(1) Utilizing the regulated flow of the stream.

(2) Purchasing an average of 32,850,000 kwh. off-peak energy per year.

(3) Utilizing pumped storage on dry years in which the stream-flow is appreciably below that of the average year—on dry years an average of 8,500,000 kwh. per year in addition to the above.

Available Secondary (Dump) Energy

In addition to the 158,000,000 kwh. firm energy thus made available, a considerable amount of secondary energy exists. From the duration curves the average generation from 1903 to 1939 equals 184,000,000 kwh. Of this only 120,200,000 kwh. per year is produced as firm energy. This leaves therefore, a net of *63,800,000* kwh. average secondary or dump energy available.

Resume of Energy Transactions Average Year

1. Firm Energy	158,000,000 kwh.
2. Secondary Energy	63,800,000 kwh.
Total Output	221,800,000 kwh.
Average Purchases Dump Energy	41,000,000 kwh. per year

It is evident, therefore, that an energy interchange contract can be arranged to interchange the dump energy required and available. For this purpose, it is proposed to build a transmission line to the nearest source of supply which can deliver 20,000 kw. dump energy during off-peak [fol. 7] hours. Provision has therefore been made in the estimates for a transmission line to Davenport, Iowa, where such sources of supply is available.

10. The proposed use or market for the power to be developed is as follows:

It is proposed to develop the ultimate power in this area as the Federal Power Commission will authorize said applicant to so do, in an orderly and progressive manner.

All power produced by the applicant will be made especially available to the non-profit Rural Electrification Cooperative Associations and Cities and Towns who distribute same on the municipal ownership plan. Preference will be given to those purchasing current for distribution who will deliver same without profit or so that the greatest benefits come to the ultimate users of said current.

It is proposed, as a separate project, to construct a transmission grid to be sponsored by a transmission cooperative to supply the various municipalities and rural cooperatives in thirty-five (35) or more counties adjacent to the project.

It is further proposed to interconnect the system with neighboring systems to provide interconnection for the purpose of obtaining off-peak energy for pumped water storage during low flow periods and disposing of surplus available energy.

Further dams, reservoirs and power houses in the watershed of the Cedar River are contemplated as future developments and will be studied, built, maintained and operated as the current or power demands develop and as authorized by the Federal Power Commission.

In the Federal Power Commission Report to the President, July 16th, 1941, recommendations are made as to new [fol. 8] generating facilities required to meet anticipated loads up to 1946. In Region #4 it is recommended that the Moline-Rock Island Manufacturing Company install three additional units of 50,000 kw. each. This will more than double their present installed capacity.

Since applicant's proposed project provides for interconnection with the system of Moline-Rock Island Manufacturing Company and since applicant expects to produce and deliver power at a lower overall cost than the proposed steam plants of the above company, it would seem that the proposed project is a logical alternate for one of the 50,000 kw. units above mentioned.

This report would seem further to bear out applicant's contention as to the urgent need for power facilities in the district to be served by him.

11. The applicant owns no power plants or facilities as it is a newly organized Corporation, except that it has been assigned the properties of the Federal Construction Company of Muscatine, Iowa, consisting of plans, reports,

studies, surveys, build, operate and maintain such project as the Federal Power Commission will license applicant to construct and operate.

12. The applicant desires to make the following of record:

(a) That it is a non-profit cooperative association.

(b) That the project will at no time be sold into private ownership.

(c) That if and when the Federal Government establishes or creates a publicly owned Federal Agency to own, build, and operate Hydro Generating facilities in the district served by applicant for the benefit of the public of the State of Iowa, applicant agrees to make available to the Government of the United States for acquisition and ownership [fol. 9] the properties and facilities of the Cooperative on condition that the proper Federal Agency desiring applicant's property, shall assume the outstanding indebtedness of its (the applicant's) properties and assure all public agencies and non-profit cooperatives, dependent upon applicant for supply of electric energy, of at least as favorable terms as they then enjoy with the applicant.

13. The following exhibits are filed herewith and are hereby made a part of this application:

Exhibit "A"—Certificate of Organization and Articles of Incorporation.

Exhibit "B"—Resolution, authorizing application for license, permits, etc.

Exhibit "C"—Statement *re* State Laws Applicable to Project.

Exhibit "D"—Statement *re* Compliance with State Laws.

Exhibit "E"—Statement *re* Water rights.

Exhibit "F"—Statement *re* Land Ownership.

Exhibit "G"—Statement *re* Financing.

Exhibit "H"—Statement re Affect on Stream Flow.

Exhibit "I"—Statement *re* Estimates of Power Available.

Exhibit "J"—General Project Map—Sheet 1.

Exhibit "K"—Statement *re* Details of Project Area.

Sheet 1—Detail of Primary Reservoir, South Half.

Sheet 2—Detail of Primary Reservoir, North Half.

Shet 3—Detail of Canal & Head Bays.

[fol. 10] Exhibit "L"—General Design.

Sheet 1—Division Dam & Spillway.

Shet 2—Profile of Diversion Canal.
Sheet 3—Intake Dam & Power House.
Exhibit "M"—Statement *re* General Description and Specifications.
Exhibit "N"—Statement *re* Estimate of Project Cost.
Exhibit "O"—*Settlement re* Time for Construction.

In Witness Whereof the applicant has caused its name to be hereunto signed by Harry J. Strong, its Secretary.
This Corporation has no Seal,
Signed this 8th day of August , 1941.
First Iowa Hydro Electric Cooperative, /s/ Harry J. Strong, Its Secretary.

[fol. 11] BEFORE FEDERAL POWER COMMISSION

OPINION NO. 110

Project No. 1853

In the Matter of FIRST IOWA HYDRO-ELECTRIC COOPERATIVE

Appearances:

For the Applicant: Andrew G. Haley, Esquire, Washington, D. C.; Howard P. Eckerman, Esquire, Davenport, Iowa; Ralph A. Thompson, Esquire, Muscatine, Iowa; Irvin Schlesinger, Esquire, Des Moines, Iowa; George B. Porter, Esquire, Washington, D. C.; Herbert G. Thompson, Esquire, Muscatine, Iowa, and Joining in the Brief: John Connolly, Jr., Esquire, Des Moines, Iowa.

For the Federal Power Commission: Willard W. Gatchell, Esquire, Washington, D. C.; W. A. Whittlesey, Esquire, Washington, D. C.

For the Intervenor: State of Iowa: Floyd Philbrick, Esquire, Des Moines, Iowa; G. H. Clark, Jr., Esquire, Ames, Iowa; and Joining in the Brief: John M. Rankin, Esquire, Des Moines, Iowa.

For the Iowa Electric Light and Power Company, Participant: Frank C. Byers, Esquire, Cedar Rapids, Iowa.

For the Iowa-Illinois Gas & Electric Company, Brief Participant: Don Barnes, Esquire, Cedar Rapids, Iowa.

[fol. 12] Representatives of Protestants and of Other Interested Individuals or Organizations: A. A. Couch, Presi-

dent of the State Federation of Labor, a participant on behalf of the Applicant.

For the National Coal Association, Protestant: Marc G. Bluth, Bell Bldg., Chicago, Ill., and James W. Haley, Southern Building, Washington, D. C.

For Northern Illinois Coal Trade Association and Middle States Fuels, Inc., Protestants: A. J. Christiansen, 310 South Michigan Blvd., Chicago, Ill.

For Progressive Mine Workers of America: John P. Madden, Carlinville, Illinois.

For Coal Trade Association of Indiana: Harold V. Scott, Traffic Manager, 632 Cherry St., Terre Haute, Indiana.

For Illinois Coal Traffic Bureau: Harry A. Rozene, 307 North Michigan Blvd., Chicago, Ill.

For Iowa Southern Utilities Company of Delaware, Protestant: Robert Valentine, Centerville, Iowa.

For Order of Railway Conductors, Protestant: W. H. Jeffries, State Legislative Representative.

For Brotherhood of Railroad Trainmen, Protestant: C. G. Brandow, State Legislative Representative.

For Brotherhood of Locomotive Engineers, Protestant: J. W. Snyder.

For Brotherhood of Locomotive Firemen and Enginemen, Protestant: T. L. Tollefson.

[fol. 13] For Iowa Division of the Isaak Walton League of America: Objector: H. C. Beard, Iowa Building, Des Moines, Iowa.

For the Iowa Coal Institute: Hugh W. Lundy, Albia, Iowa, and John M. Drabelle, Cedar Rapids, Iowa.

For District 13 - Iowa, United Mine Workers: Dave Crowe, Albia, Iowa.

For Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of the Estate of the Chicago, Rock Island and Pacific Railway Company: A. B. Howland, 500 Bankers Trust Bldg., Des Moines, Iowa.

For American Telephone & Telegraph Company: P. C. Elvis, Chicago, Illinois.

For Iowa State Highway Commission: Fred R. White, Chief Engineer and G. H. Clark, Jr., General Counsel.

For Iowa State Conservation Commission: Objectors: Fred Schwob, Dr. R. M. Bailey, and E. B. Speaker, of the Commission; Fred Poyneer, Commissioner; Floyd Philbrick, First Assistant Attorney General.

For Iowa State Building and Construction Trades Council: P. R. Ferris, G. A. Elliott, and G. A. Baldus.

For 97 Farmers Living Adjacent to Proposed Site: George Corriell.

[fol. 14] OPINION

By the Commission:

This matter is before us upon an application filed on August 11, 1941, by First Iowa Hydro-Electric Cooperative for a license under the Federal Power Act to authorize the construction and operation of a power development on the Cedar River in Muscatine and Cedar Counties, Iowa, and extending to the Mississippi River north of Muscatine. Supplements to the application have been filed to modify the project in certain particulars.[1]

The Project

The project as now proposed would consist of an 8,300-foot dam across the Cedar River approximately 21 miles upstream from its confluence with the Iowa River, with a 15,000-foot dike on the western bank of the river; a reservoir of aproximately 11,000 acres; a diversion canal leading from the main reservoir in a southeasterly direction to a reservoir created by construction of a dam across Mad Creek, an additional length of canal from the Mad Creek reservoir to a small reservoir or forebay created by the construction of a dam across Geneva Creek; a powerhouse having four turbo-generating units with an aggregate

[1] Additionally, the Cooperative filed a declaration of intention (Docket No. D1-154) in January, 1940, for a run-of-river hydroelectric development to be located on the Cedar River at about the same location as the presently proposed development, but not extending to the Mississippi River, and in April, 1941, this was supplemented to incorporate many of the features found in the present application. After an investigation, in the course of which the Governor of the State of Iowa was invited to present his views, the Commission on June 3, 1941, found that the Cedar River and the Iowa River, into which it flows, are navigable waters of the United States, and that the interests of interstate commerce would be affected by the proposed construction.

generating capacity of 70,000 horse-power, together with appurtenant structures; and a discharge canal approximately 6,000 feet long running parallel to the Mississippi River and discharging into the pool immediately below United States Dam No. 16 near Muscatine. The main [fol. 15] reservoir on the Cedar River would flood certain islands to which title is held by the United States.

As first presented, the plans of the applicant for developing the water resources of the Cedar River were neither desirable nor adequate, but many important changes in design have been made.[2] The applicant has also agreed to certain modifications proposed by the Chief of Engineers of the War Department. The present plans call for a practical and reasonably adequate development to utilize the head and water available, create a large storage reservoir, and make available for recreational purposes a considerable area now unsuitable for such use, all at a cost which does not appear to be unreasonable.

Further changes in design may be desirable, but they are minor in character and can be effected if the applicant is able to meet the other requirements of the Act.

The Legal Issue Posed

The State of Iowa (through its Attorney General) was granted leave to intervene in this proceeding and contends that the applicant has failed to comply with the require-

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[2] Section 10(a) of the Act provides:

That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

ments of Section 9(b)[3] of the Federal Power Act in that [fol. 16] it has not obtained the approval of the State Executive Council of Iowa for construction of the project.

Section 9(b) of the Act requires that, before issuing a license, the Commission must be satisfied that the applicant has compiled with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes, and with respect to the right to engage in the business of developing, transmitting, and distributing power and in any other business necessary to effect the purposes of a license.

It is pointed out by the State that Section 7767 of Chapter 363 of the 1939 Iowa Code provides that no dam shall be constructed "in any navigable or meandered stream for any purpose, or in any other stream for power purposes, unless a permit has been granted by the Executive Council * * *." Section 771 further provides that the State Executive Council shall grant such permit if certain conditions are met, among which is a requirement that "any water taken from the stream in connection with the propect is returned thereto at the nearest practicable place without being materially diminished in quantity * * *."

The applicant has not applied for a permit from the State Executive Council with respect to the project as now proposed and contends that it is not required to obtain such permit in order to satisfy the requirements of Section 9(b) of the Federal Power Act. In support of this contention, the applicant asserts that since this project involves the diversion of water from the Cedar River to the Mississippi

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[3] Sec. 9. That each applicant for a license hereunder shall submit to the Commission * * *

(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act. (See also Section 27 of the Act.)

River, the conditions of Section 7771 of the Iowa Code cannot be met and the Council would be unable to issue a permit for this project. The applicant further contends that [fol. 17] the Iowa statute is invalid insofar as it would preclude the construction and operation of the project because the statute represents an undue interference by a State with the exercise of the Federal Government's authority over navigable waters of the United States.

Conclusion

We have given careful consideration to the conflicting contentions of the applicant and the State of Iowa with respect to the applicability and effect of the Iowa statutes in this proceeding. But, as previously indicated, we are bound by the requirements of Section 9(b) of the Federal Power Act, which provides for submission to the Commission of satisfactory evidence that the applicant has complied with the State laws. The appropriate place for a determination of the validity of such State laws is in the court and, if we dismiss the application for license on the basis of failure to comply with the requirements of Section 9(b), applicant may seek review of our action and its contentions under Section 313(b) of the Federal Power Act.

An appropriate order in accordance herewith will be issued.

Leland Olds, Chairman, Claude L. Draper, Commissioner, Basil Manly, Commissioner, John W. Scott, Commissioner, Nelson Lee Smith, Commissioner.

Dated at Washington, D. C., this 29th day of January, 1944.

Leon M. Fuquay, Secretary.

[fol. 18] BEFORE FEDERAL POWER COMMISSION

Commissioners: Leland Olds, Chairman, Claude L. Draper, Basil Manly, John W. Scott and Nelson Lee Smith.

In the Matter of FIRST IOWA HYDRO-ELECTRIC COOPERATIVE

Project No. 1853

ORDER DISMISSING APPLICATION FOR LICENSE—January 29, 1944

Upon application filed August 11, 1941, as later supplemented, by First Iowa Hydro-Electric Cooperative, with offices in Muscatine and Davenport, Iowa, for license under the Federal Power Act for a proposed power project to be located on the Cedar River in Muscatine and Cedar Counties, Iowa, and extending to the Mississippi River north of Muscatine;

For the reasons given, and the facts found in Opinion No. 110 adopted this date and made a part hereof by reference, the Commission *finds* that:

The applicant has not presented satisfactory evidence, pursuant to Section 9(b) of the Federal Power Act, of compliance with the requirements of applicable laws of the State of Iowa requiring a permit from the State Executive Council to effect the purposes of a license under the Federal Power Act, and the pending application, as supplemented, should be dismissed without prejudice; [fol. 19] It is *ordered* that:

The pending application filed August 11, 1941, as supplemented, be and it is hereby dismissed without prejudice to renewal within one year upon satisfying the requirements of Section 9(b) of the Federal Power Act.

By the Commission.

Leon M. Fuquay, Secretary.

BEFORE THE FEDERAL POWER COMMISSION

In the Matter of FIRST IOWA HYDRO-ELECTRIC COOPERATIVE

Project No. 1853

APPLICATION FOR REHEARING

Comes now First Iowa Hydro-Electric Cooperative, Applicant in the above entitled matter, by its attorneys, and pursuant to Section 313(a) of the Federal Power Act,

states that it is a person aggrieved by the Order of the Commission dated January 29, 1944, dismissing the application for license, and makes this application for rehearing. As grounds therefor, Applicant states:

1. On January 29, 1940 Applicant, First Iowa Hydro-Electric Cooperative, filed its declaration of intention, pursuant to Section 23(b) of the Federal Power Act, to construct a project on the Cedar River in the State of Iowa. On April 2, 1941, supplemental documents further describ- [fol. 20] ing the project were filed. On June 3, 1941 the Federal Power Commission issued its Opinion and Order incorporated herein by reference, in which the Commission found that the Cedar and Iowa rivers are navigable waters of the United States, that the interests of industry and commerce would be affected by construction of the project, that public lands of the United States would be affected, and that a license for the construction of the project proposed was required under the provisions of the Federal Power Act. This decision and order of the Federal Power Commission, though due and lawful notice thereof was served upon the State of Iowa by the Commission, was not objected to or appealed from by the State. Pursuant to the Order of June 3, 1941, Applicant, on August 11, 1941, filed its application for license. Publication of the filing of said application was duly made, and the statutory notices served. On October 14, 1941, a hearing upon the application was ordered, and was subsequently held at Davenport, Iowa, commencing on January 12, 1942, and concluding on January 28, 1942. Upon appropriate petition thereafter filed on April 7, 1942, the Commission ordered a further hearing which was held in Chicago, Illinois, May 18 to May 20, 1942, inclusive. The case was fully briefed by applicant, and by parties who had been permitted to intervene or participate in the proceedings, and by counsel for the Federal Power Commission.

2. On January 29, 1944, the Commission entered its final order dismissing the application of the First Iowa Hydro-Electric Cooperative for license. The *sole* reason given for such dismissal, as stated in the Order and Opinion concurrently issued, was that the Applicant had not presented satisfactory evidence under Section 9(b) of the Federal Power Act, that it had complied with applicable laws of the State of Iowa "requiring a permit from the State Executive

[fol. 21] Council to effect the purposes of a license under the Federal Power Act". This finding is arbitrary and capricious *in that* it is not supported by any evidence. Applicant, on the contrary, has submitted cogent evidence within the purview of Section 9(b) of the Federal Power Act that it has complied with all applicable laws of the State of Iowa, and a finding should be made accordingly. But for the reason stated by the Commission, *i. e.*, the jurisdictional question, there can be no doubt that Applicant would be entitled to the issuance of a license, as the Commission found (p. 6, Commission's Opinion) that the Applicant had agreed to certain minor modifications proposed by the Chief of Engineers of the War Department, and that "the present plans call for a practical and reasonably adequate development to utilize the head and water available, create a large storage reservoir, and make available for recreational purposes a considerable area now unsuitable for such use, all at a cost which does not appear to be unreasonable."

3. The navigability of the Cedar and Iowa Rivers is not in issue. The order of the Federal Power Commission of June 3, 1941 became final and absolute upon the entry of such order, and the failure of any person, or the State of Iowa to take an appeal therefrom, lawful and statutory notice, having been served as to the entry of such order. When this order became final the jurisdiction and authority of the Federal Power Commission, as contained in Sections 4 and 23 in particular and in other sections of the Federal Power Act, became definite, absolute, final and exclusive.

4. Whatever jurisdiction and authority existed in the State of Iowa and its Executive Council prior to June 3, 1941, under Chapter 363 of the Iowa Code of 1939, ceased upon the assumption of jurisdiction by the Federal Power Commission under its order of June 3, 1941.

[fol. 22] 5. If the Acts of Congress of May 6, 1870 (61 Stat. 121) and August 18, 1894 (28 Stat. 356) may be so construed as to have relinquished the jurisdiction of the Federal Government over the stream in question, which Applicant does not concede, the Congress again assumed complete jurisdiction in the passage and approval of the Federal Power Act of 1920. And it should be noted that

Section 29 thereof provides for repeal of all acts or parts thereof inconsistent with such Act.

6. The Applicant has satisfied the requirements of Section 9(b) of the Federal Power Act in that Sections 7767, 7771, 7776 of Chapter 363, Iowa Code 1939, are inapplicable to waters of the United States as distinguished from waters of the State. Therefore, upon passage and approval of The Federal Power Act and or after the entry of the Commissioner's Order of June 3, 1941, the requirements of the Iowa Code for obtaining a permit from the State Executive Council for the construction, operation or maintenance of a dam over the stream in question became inapplicable; the prior trusteeship of the State ceased to exist. Furthermore, the jurisdiction of the Federal Government over the navigable waters of the United States, insofar as the licensing of power projects is concerned, is exclusive in nature and requires a uniform rule of regulation. To interpret Section 9(b) of the Federal Power Act as requiring compliance with Chapter 363 of the Iowa Code would, therefore, be to render said Section unconstitutional. However, it is a well established principle of statutory interpretation, that if two interpretations of a statute are possible, one of which would render it constitutional and the other unconstitutional, that interpretation which renders the law valid will be assumed to be the one intended by the legislature. Therefore, Section 9(b) of the Federal Power Act must be interpreted so as not to relinquish the exclusive jurisdiction of the [fol. 23] Federal Government in this field. Even if applicable, the Iowa statute presents a clear cut conflict of jurisdiction, and upon the assumption of jurisdiction by the Federal authority the inconsistent or conflicting statute of the State must give way to the assumption of Federal jurisdiction lawfully delegated to the Congress by the Commerce Clause of the Constitution. Insofar as the State statute may authorize the State to take the same or concurrent action as the Federal Power Commission may take under the Federal Power Act, the State statute must be held unconstitutional in such respects. The Commission has thus exceeded its statutory authority in attempting to require compliance with an unconstitutional law (Chapter 363, Iowa Code, 1939).

7. When Section 9(b) of the Federal Power Act is construed in connection with other provisions of the Act, par-

ticularly Sections 4, 10(a), and 23 thereof, it must be concluded that the power and authority conferred upon The Federal Power Commission is not subservient to or repealable by an individual state. Nowhere in Section 4 is there a limitation upon the authority of the Federal Power Commission over navigable waters of the United States. Section 23(b), in providing that a license must be obtained from the Commission before the construction of a dam on streams other than those defined a navigable waters, if the interests of interstate commerce will be affected, and in providing also that dams may be constructed on such streams without license if the Commission finds that interstate commerce is not thereby affected, upon compliance with state laws, is a clear indication that Section 9(b) is to be construed so as not to require a state permit in a case where the Commission has finally determined navigability and that interstate commerce will be affected.

[fol. 24] 8. The provision of Chapter 363 of the Iowa Code of 1939 requiring a permit from the State of Iowa, even if held applicable under Section 9(b) of the Federal Power Act, does not provide for a judicial proceeding before any court or commission empowered to determine whether a license or permit shall issue. On the other hand, the issuance of a permit is lodged solely with the discretion of an "executive council" composed of the Governor of the State and certain administrative or executive officials. The statute is therefore unconstitutional in that an applicant is not afforded due process by reason of the absence of a judicial proceeding and right of review by a Court of law. Thus, if held applicable, executive fiat of a single state can supplant, thwart, or repeal the authority of the Commission to grant or refuse licenses after judicial proceeding.

9. The primary objectives of the Federal Power Act are navigability, flood protection, watershed development, and recovery of the costs of improvements through utilization of power. The Commission has misinterpreted the requirements of Section 9(b) with the result that the foregoing objectives are entirely defeated. This has been done with full knowledge on the Commission's part of the State's position that in no event would the State Executive Council issue a permit to the Applicant even if the Applicant attempted to comply with the obviously inapplicable local

statutes, which position violates statutory and constitutional rights of the Applicant.

Wherefore, in view of the foregoing, it is respectfully prayed that the Commission reconsider and set aside its action of January 29, 1944 in dismissing the application for license, and upon such reconsideration order issuance [fol. 25] of the license, or that the Commission enter its order granting a rehearing.

Respectfully submitted, First Iowa Hydro-Electric Cooperative, by George B. Porter, Porter and Haley, 1101 Earle Building, Washington, D. C.

—— ——, Of counsel for First Iowa Hydro-Electric Cooperative.

Duly sworn to by George B. Porter. Jurat omitted in printing.

[fol. 26] CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing application for rehearing by mailing a copy thereof properly addressed to the following persons of record in this proceeding:

William W. Gatchell, Esquire,
Federal Power Commission,
Washington, D. C.;

Honorable Floyd Philbrick,
First Assistant Attorney General of Iowa,
Des Moines, Iowa;

Frank C. Byers, Esquire,
Iowa Electric Light and Power Company,
Cedar Rapids, Iowa;

Don Barnes, Esquire,
Iowa-Illinois Gas and Electric Company,
Cedar Rapids, Iowa.

Dated at Washington, D. C., this 29th day of February, 1944.

George B. Porter.

—— ——, of counsel for Iowa Hydro-Electric Cooperative.

[fol. 27] BEFORE FEDERAL POWER COMMISSION

Commissioners:

Basil Manly, Acting Chairman, Claude L. Draper, John W. Scott and Nelson Lee Smith. Leland Olds not participating.

Project No. 1853

In the Matter of FIRST IOWA HYDRO-ELECTRIC COOPERATIVE

ORDER DENYING APPLICATION FOR REHEARING—March 7, 1944

Upon application filed February 29, 1944, by First Iowa Hydro-Electric Cooperative for rehearing and reconsideration of the Commission's order of January 29, 1944, dismissing the application for license for Project No. 1853; and

It appearing that the application for rehearing does not advance any arguments in support of the applicant's position which were not previously advanced in its briefs and considered by the Commission in the order of January 29, 1944;

The Commission *finds* that no useful purpose would be served by granting the petition for rehearing, and that reconsideration of the order of January 29, 1944, dismissing the application for license would not be appropriate.

It is *ordered* that the application for rehearing be and it is hereby denied.

By the Commission.

J. H. Gutride, Acting Secretary.

[fol. 28] BEFORE FEDERAL POWER COMMISSION

* * * * * * *

RALPH THOMPSON, called as a witness on behalf of the applicant, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. H. G. Thompson:

Q. What is your name?

A. Ralph Thompson.

Q. Where do you live?
A. Muscatine, Iowa.
Q. What is your profession or calling?
A. Attorney at law.
Q. How long have you practiced law?
A. Since 1903.
Q. Where have you practiced?
A. Muscatine, Iowa.
Q. In what branch of the practice?
A. General practice.
Q. Do you know Harry J. Strong?
A. I do.
Q. Do you know what position, if any, he holds with the First Iowa Hydro-Electric Cooperative?
A. I do.
Q. What position?
A. Secretary, and a member of the Board of Directors.
Q. Did you know him in March of 1941?
A. I did.
Q. Did he, as an officer or a director, and Secretary, of the First Iowa Hydro-Electric Cooperative, call on you with respect to an opinion with regard to the inapplicability of or the applicability of the statutes of Iowa in regard to an application to be filed with the Federal Power Commission for a license to construct the project now under consideration?
A. Yes, he did.
Q. And did you give him an opinion as to the law at that time?
A. I did.
Q. And what did you say, or what opinion did you render to him at that time?

Mr. Philbrick: That is objected to, if the Trial Examiner please, as being an opinion and conclusion of the witness, and while the witness may be qualified to give an opinion [fol. 29] and conclusion on the matter by reason of his profession, nevertheless it is wholly irrelevant and immaterial and is not a proper method of proof as to compliance with the laws of the State of Iowa; and furthermore, it seeks to have the witness express as an opinion and conclusion one of the ultimate questions to be determined by the Examiner and the Commission.

Trial Examiner: I don't think that is the case here. I think that Mr. Philbrick overlooks the fact that the question here is not what the opinion of Mr. Thompson presently is, but what the opinion was which he gave to the Co-operative.

Mr. Philbrick: Which would be irrelevant and immaterial to any issue here.

Trial Examiner: That may be. However, we will admit it and determine that later.

Mr. H. G. Thompson: What did you advise Mr. Strong in that respect?

Mr. Philbrick: The same objection as last made.

Trial Examiner: The objection is overruled.

Mr. Philbrick: May we have an exception on this, please?

Trial Examiner: Exception will be noted for the State of Iowa.

The Witness: In March, 1941, upon an investigation of the Federal and State laws, I advised Mr. Strong that in the event the Federal Power Commission took jurisdiction of the Cedar River, that the provisions of Chapter 363, Iowa Code, 1939, and other state statutes, requiring a permit for the construction of a dam in meandered navigable waters, would not be applicable to the proposed project under the provisions of the Federal Power Act.

[fol. 30] Mr. Philbrick: We now move to strike the answer for the reason that it is wholly irrelevant and immaterial to any issue in this case.

Trial Examiner: For the purpose stated, the motion is refused.

By Mr. H. G. Thompson:

Q. Do you propose to file with the Federal Power Commission a brief and argument in regard to the State and Federal law appertaining to the legal opinion and advice that you gave Mr. Strong, and as just stated by you?

Mr. Philbrick: That is objected to as being wholly irrelevant and immaterial. It can be of no probative value to the determination of any issue in this cause.

Trial Examiner: I don't think this answer would be material. I think the only question that is here is as to whether compliance was made, and as to whether it was done on the advice of counsel, which was the purpose that I understood this witness was offered for. The future

intention as to filing a brief can just as well be stated by counsel and not by sworn testimony.

Mr. H. G. Thompson: The question will come up on cross-examination, and we don't want to conduct any college of law on the law questions involved in this matter, at this hearing at least. We don't want any debate on the law between the witness and counsel for the state or counsel for the Government, and he proposes to file his brief and argument with the Federal Power Commission, who are entitled to his reasons and the reasons why the Cooperative followed his advice.

Trial Examiner: I don't think this is material here, Mr. Thompson. I think he may make a statement that will [fol. 31] have just the same weight as if made on the stand, to that effect.

Mr. H. G. Thompson: Well, on behalf of the Co-operative I say to this Commission that we propose to file with the Federal Power Commission a brief and argument of the law covering this phase involved in this hearing, as to the applicability of the State statutes of Iowa that have been introduced in evidence here as Exhibit No. 67.

Trial Examiner: It will be so noted.

Mr. H. G. Thompson: You may cross-examine.

Trial Examiner: Are there any questions, Mr. Gatchell?

Mr. Gatchell: Yes, I have one question.

Mr. H. G. Thompson: Will you pardon me. I do want to ask a couple of other questions.

Trial Examiner: All right.

By Mr. H. G. Thompson:

Q. Are you acquainted with the territory in and about the area covered by this project?

A. I am.

Q. And are you acquainted with the area down to the mouth of the Cedar River in Muscatine County?

A. I am.

Q. Do you know whether there are any dams or other water rights within the area or below the diversion dam to the mouth of the Cedar River?

Mr Philbrick: That is objected to as irrelevant and immaterial and for the further reason that it is incompetent, there having been no showing of the qualifications of the

witness to testify as to what, if any, water rights there might or might not be there; and it calls for the opinion and conclusions of the witness; and can have no probative value.

Trial Examiner: Will counsel state the purpose of that inquiry?

[fol. 32] Mr. Gatchell: I suggest, Mr. Trial Examiner, that the applicant is required to file, as Exhibit E, the Nature and Extent and ownership of water rights which the applicant proposes to use in the development of the project covered by the application. The pending question would go to whether there are any other rights to be acquired. Therefore, it would be pertinent with respect to the inquiry here.

Mr. Philbrick: I would say that should properly have been a part of their main case, and even this is not the proper method of proof.

Trial Examiner: I think that there has been nothing to show yet counsel's familiarity with it, and I don't think we can assume, from the fact that he is one of several counsel, that he made an investigation of this fact, Mr. Thompson.

Mr. H. G. Thompson: I asked him if he was familiar and whether he knew.

Mr. Gatchell: He is an attorney——

Trial Examiner (interposing): That is a combination of two questions.

Mr. H. G. Thompson: We will not debate it.

By Mr. H. G. Thompson:

Q. I will ask you further, Mr. Thompson, have you made any investigation of the public records of Muscating County, including the plat book showing the ownership of lands within the county, and from a personal inspection of the Cedar River can you state whether there are any dams or other water rights within the area of this project, or the Cedar River to its mouth, in Muscatine County?

A. I made that examination.

Mr. Philbrick: I make the same objection.

Trial Examiner: The objection is overruled; I will permit the answer.

[fol. 33] By Mr. H. G. Thompson:

Q. And did you find any dam in the Cedar River, or any water rights within the project or in the Cedar River within the boundaries of Muscatine County?

Mr. Philbrick: The same objection as last made, and also the question calls for secondary evidence and can be of no probative value as to what water rights might be involved. The question is general, as to water rights.

Trial Examiner: I think the witness may answer this question. The objection is overruled; exception will be noted for the State of Iowa.

The Witness: From my examination of the records I found no such grants, and from the physical examination of the river from the point you mentioned, there is no existing dam or other rights.

Mr. Philbrick: I move to strike the first part of the answer for all the reasons stated in my objection.

Trial Examiner: The motion is refused; exception will be noted for the State of Iowa.

By Mr. H. G. Thompson:

Q. Have you made any investigation as to whether, within the area in question, or the Cedar River from this project down to its mouth, whether there is any irrigation, ditches, or municipal water rights involved?

A. I did.

Q. And did you find any such?

A. I found no such.

Mr. Philbrick: That is objected to for all the reasons previously stated, and we move to strike the answer for the same reasons, not having had an opportunity to make an objection before the question was answered.

Trial Examiner: The objection is overruled, and to save time we will rule against the motion also. Exception will be noted for the State of Iowa.

[fol. 34] By Mr. H. G. Thompson:

Q. I will ask you if, within the area of this project or along the Cedar River to its mouth, whether you made an investigation as to whether there is any state park or public lands or public preserves?

Mr. Philbrick: That is objected to for all the reasons last stated. I won't take the time, unless the Trial Examiner desires me to, to repeat the objection.

Trial Examiner: I don't think it is necessary to repeat the objection. I am not sure that this is material. However, we will permit the question and consider the importance of it later. This is not a jury trial.

The Witness: I made such an investigation.

Mr. H. G. Thompson: Did you find any public parks, state parks, public lands or preserves of the State of Iowa in any of the area of this project, or along the Cedar River to its mouth?

Mr. Philbrick: The same objection.

Trial Examiner: The objection will be overruled.

The Witness: I did not.

Mr. H. G. Thompson: And is there any such existing?

Mr. Philbrick: The same objection.

Trial Examiner: The objection will be overruled.

The Witness: There are no such.

Mr. H. G. Thompson: Take the witness.

Trial Examiner: You may cross-examine, Mr. Gatchell.

Cross-examination.

By Mr. Gatchell:

Q. You stated that you advised Mr. Strong that there were no state laws requiring compliance by this applicant in so far as concerns the filing of an application with the [fol. 35] Federal Power Commission for this proposed project?

A. That is correct?

Q. Are you of the same opinion today?

A. I am.

Mr. Gatchell: No further questions.

Trial Examiner: Any questions, Mr. Philbrick:

Cross-examination.

By Mr. Philbrick:

Q. Did you make any examination as to whether there were any public highways that might be affected?

Mr. H. G. Thompson: Objected to as immaterial and irrelevant. Public highways are not public lands within the

meaning of the Federal Power Act, or the statutes of the State of Iowa.

Trial Examiner: To save time we will permit the witness to answer the question.

The Witness: Yes, I know all about the public highways down there. I travel them every day, nearly.

By Mr. Philbrick:

Q. There are quite a number of them, aren't they?

A. Oh, the average throughout the State; not so many in that area, though; not any there.

Q. Did you make any examination from the mouth of the Cedar to the mouth of the Iowa?

Mr. H. G. Thompson: Objected to as incompetent, irrelevant and immaterial and not proper cross examination. The Iowa River and its environs is not involved in this hearing.

Mr. Philbrick: Well, Mr. Nash gave some testimony about the Iowa River.

Trial Examiner: I think this is certainly not responsive to any direct examination of this witness. I think I will have to sustain the objection, Mr. Philbrick.

[fol. 36] By Mr. Philbrick:

Q. Are there any cemeteries along the Cedar in that vicinity, or anywhere along the Cedar, that would be affected by this project?

Mr. H. G. Thompson: Objected to as incompetent, irrelevant and immaterial, unless they are affected by this project.

Trial Examiner: I understood that to be a part of the question.

Mr. H. G. Thompson: You would have to assume it because he didn't say it.

Mr. Philbrick: Yes I did.

Trial Examiner: With that amendment as now made, we will permit the question to be answered.

The Witness: There is a cemetery at Moscow, but I don't think it is affected by this project, and that isn't a public preserve such as mentioned in the statute.

By Mr. Philbrick:

Q. You wouldn't be sure that it wasn't affected by the project, would you?

A. It isn't affected by this project in that it isn't a state or a national preserve. It is either a private or a municipal cemetery, and doesn't come within the province of the Act.

Q. It is a public cemetery, however?

A. Not State or National.

Mr. Philbrick: I think that is all.

Mr. Gatchell: No further questions.

Trial Examiner: Is there any redirect?

Redirect examination.

By Mr. H. G. Thompson:

Q. You know that any of the cemeteries located at Moscow or others here are outside of the lines of this project?

Mr. Philbrick: That is objected to; counsel can't cross-examine his own witness——

[fol. 37] Trial Examiner (interposing): I think the form of the question is objectionable, Mr. Thompson.

By Mr. H. G. Thompson:

Q. Did you find any cemeteries of any nature within the confines of this project, that would be affected by the building of this project?

A. I did not.

Q. And do any exist?

A. No, there are none existing.

Mr. H. G. Thompson: You are excused.

Trial Examiner: There is no re-cross, I presume?

Mr. Gatchell: No, sir.

Mr. Philbrick: No questions.

Trial Examiner: As I understand, that completes your request?

Mr. H. G. Thompson: There was some general testimony here offered by the professor from Iowa City, I forget his name, that the building of artificial dams was very injurious to fish life——

Trial Examiner (interposing): I don't understand that that is material here. The question I asked was this. You

asked for the right to substitute a witness of your own at the present time, and that is completed; you have nothing further on that, I take it?

Mr. H. G. Thompson: That is right, that will be all at this time.

* * * * * * * * *

[fol. 38] IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

No. 8752

FIRST IOWA HYDRO-ELECTRIC COOPERATIVE, a Non-Profit Cooperative Association, Petitioner,

v.

FEDERAL POWER COMMISSION, Respondent

PETITION FOR REVIEW—Filed May 5, 1944

To the Honorable, the Judges of the United States Court of Appeals, for the District of Columbia:

First Iowa Hydro-Electric Cooperative, a non-profit cooperative association, Petitioner, files its petition under Section 313 (b) of the Federal Power Act (49 Stat. 860, 16 U. S. C. 825 l, Title 2 of the Public Utility Act of 1935 approved August 26, 1935, amending the Federal Water Power Act, approved June 10, 1920, 41 Stat. 1063, 16 U. S. C. 791-823) against the Federal Power Commission, hereinafter designated as Respondent or the Commission, to review and set aside an order entered by it on the 29th day of January, 1944, and thereupon shows unto the Court the following:

1. Petitioner is a non-profit cooperative association, organized under the laws of the State of Iowa, by a group of farmers and other persons interested in cooperative ownership and distribution of electric power on a non-profit basis. On January 29, 1940 Petitioner filed with the Federal Power Commission its declaration of intention pursuant to Section 23 (b) of the Federal Power Act *supra* [fol. 39] to construct a hydroelectric power project utilizing the waters of the Cedar River (which has its source in the

State of Minnesota and flows through Iowa) and the Mississippi River. On June 3, 1941, the Federal Power Commission entered an order by which it conclusively determined that navigable waters of the United States are involved, that the interests of industry and commerce would be affected by construction of the project, that public lands of the United States would be affected, and that a license for the proposed construction is required under the provisions of the Federal Power Act. This order of the Respondent, though proper and timely notice thereof was served upon the State of Iowa, became final and absolute and there was no appeal taken therefrom. In accordance with the findings of the Respondent in its aforesaid order of June 3, 1941, Petitioner, on August 11, 1941, filed its application for license for the proposed project including therewith associated exhibits, plans, and specifications of the proposed project as required by the rules of the Commission. Publication of the filing of the application for license was duly made and the statutory notices served. A hearing upon the application was ordered to be held, which hearing commenced in Davenport, Iowa on January 12, 1942, and was concluded on January 28, 1942. Thereafter, and pursuant to appropriate petition, the Commission reopened the proceedings, by order of April 7, 1942, and further hearing was held in Chicago, Illinois, commencing May 18, 1942 and concluding May 20, 1942. The State of Iowa, through its Attorney General, by petition, had been permitted intervention in the proceedings held both at Davenport, Iowa, and Chicago, Illinois. In addition, limited participation was allowed by Respondent to Iowa Electric Light & Power Company and Iowa-Illinois Gas & Electric Company. Upon the conclusion of the hearings, briefs were filed by Petitioner, the State of Iowa, Intervenor, the Iowa Electric Light & Power Company and Iowa-Illinois Gas & [fol. 40] Electric Company as limited participants, and by counsel for the Commission. On January 29, 1944, respondent Commission entered its opinion and order herein complained of dismissing Petitioner's application for license. By said opinion and order, the Commission found, "The present plans call for a practical and reasonably adequate development to utilize the head and water available, create a large storage reservoir and make available for recreational purposes a considerable area now unsuitable for such use, all at a cost which does not appear to be

unreasonable." Notwithstanding such findings on the general merits of petitioner's application for license, the Commission dismissed said application (with leave to renew within one year) upon the sole ground that petitioner failed to comply with Section 7767 of Chapter 363 of the 1939 Iowa Code, which provides that no dam shall be constructed "in any navigable or meandered stream for any purpose, or in any other stream * * * for power purposes, nor shall any such water be taken from such streams for industrial purposes, unless a permit has been granted by the executive council * * *" In its opinion, the Commission stated, "The appropriate place for a determination of the validity of such state laws is in the courts, and, if we dismiss the application for license on the basis of failure to comply with the requirements of Section 9 (b), applicant may seek review of our action and its contentions under Section 313 (b) of the Federal Power Act." An appropriate application for rehearing, as required by Section 313 (a) of the Federal Power Act *supra*, was filed by Petitioner with the Commission on February 29, 1944, and denied by the Commission by its order entered March 7, 1944.

2. The hydroelectric project proposed by Petitioner in its application, supporting papers and supplement thereto, involves the diversion of water from the Cedar River from [fol. 41] a point approximately eight miles northwest of Muscatine, Iowa, to a point on the bluffs of the Mississippi River about two miles north of Muscatine at which point the water so diverted would be dropped approximately 104 feet through four generating units of a power plant structure and thence emptied into the Mississippi River by means of a tail race a short distance below the generating plant. The main diversion dam would be constructed on the Cedar River at the point about eight miles northwest of Muscatine, and approximately 29 miles above the junction of the Cedar and Iowa Rivers at Columbus Junction, Iowa, and this main dam would create a primary reservoir or lake of approximately 11,000 land acres in area. A diversion canal, beginning at a point near the southeast corner of the primary reservoir, would extend in a general southeasterly direction to a point on the north bank of the Mississippi River at the mouth of Geneva Creek and about two miles above the City of Muscatine, Iowa. At

one point along the route of the diversion canal a dam is required to prevent the discharge of water from the reservoir through a small creek known as Mad Creek, which runs through the City of Muscatine. This dam, referred to as Mad Creek Dam, will create a small reservoir along the course of the diversion canal and this reservoir would have approximately 920 land acres. This reservoir is referred to as the Mad Creek or Secondary Reservoir. At the termination of the diversion canal on the north bank of the Mississippi River at a point where Geneva Creek empties into the Mississippi, a second small dam known as Geneva Creek Dam would be constructed and would form a reservoir of approximately 160 land acres. This reservoir is variously referred to as Geneva Creek Reservoir, the headbay, or the forebay. From the headbay the water so diverted would be dropped through the power plant structure of four turbo-generating units having an aggregate generating capacity of 50,000 kw. Two of these units will [fol. 42] be so designed as to permit the reversal of the turbines, using the generators as motors, for the purpose of pumping water from the Mississippi River back into the headbay and canal above the power house during periods of low water flow when it would be desirable to provide pumped storage of water. The location of Geneva Creek and the proposed power plant structure is a short distance (about 6,000 feet) above War Department Dam No. 16 on the Mississippi River. By constructing a tail race from the power plant along the bank of the Mississippi River to the point on the Mississippi River immediately below Dam No. 16 an additional waterfall of about 10 feet can be secured over and above that which would obtain were the water to be emptied into the Mississippi River directly at the location of the power plant. Yet, if necessary to pump water from the Mississippi River to the headbay of the diversion canal, the water could be pumped directly from the Mississippi River level opposite the power plant, thus gaining for pumpback purposes approximately 10 feet. It is estimated that the hydroelectric plant will be capable of supplying 200,000,000 kw. hours of marketable power per year of which 151,000,000 kw. hours per year will be firm power. Construction of the project will result in the creation of three ideal and badly needed recreational facilities with an aggregate area of approximately 12,000 land acres.

and in a portion of the State of Iowa practically devoid of such facilities.

As stated in Opinion No. 110 of the Respondent, "The applicant has also agreed to certain modifications proposed by the Chief of Engineers of the War Department".

3. Chapter 363 of the 1939 Iowa Code is entitled "Mill Dams and Races", and comprises Sections 7767 through 7796. The provisions raised by the Commission in this case are:

> [fol. 43] 7767: "No dam shall be constructed, maintained, or operated in this state in any navigable or meandered stream for any purpose, or in any other stream * * * for power purposes, nor shall any such water be taken from such streams for industrial purposes, unless a permit has been granted by the executive council * * *"
>
> 7771: "If it shall appear to the council that the construction, operation or maintenance of the dam will not materially obstruct existing navigation, or materially affect other public rights, will not endanger life or public health, and any water taken from the stream in connection with the project is returned thereto at the nearest practicable place without being materially diminished in quantity or polluted or rendered deleterious to fish life, it shall grant the permit upon such terms and conditions as it may prescribe,".

One other provision is of importance, namely:

> 7776: "The executive council shall investigate methods of construction * * * and equipment of dams, so as to determine the best methods to conserve and protect as far as possible all public and riparian rights in the waters of the state."

The Commission dismissed the application on the ground that the applicant has not complied with the requirements of Section 9(b), because it has not obtained a permit from the Executive Council under Section 7767. Nowhere in Section 9 (b) is there any inference that a permit must be obtained from the State before the project will be licensed by the Federal Power Commission. If Congress intended that the construction of proposed power projects in navigable waters of the United States must first be licensed by

the various states in which they are to be constructed, it would have said so. The facts that Congress did not require licenses or permits from the states to initiate power projects, and that it did enumerate other requirements that must be complied with, indicates its intent not to require licenses or permits for such purpose.

[fol. 44] The text of Section 23 (b) of the Federal Power Act also shows that it was not the intention of Congress to require licenses or permits from the states to initiate project works. Section 23 (b) provides that a license must first be obtained from the Federal Power Commission before any dam can be constructed on any *non-navigable* stream, if the interests of interstate commerce will be affected by such construction. The section then provides that if the interests of interstate commerce are not affected, "permission is hereby granted to construct such dam or other project works in such stream *upon compliance with state laws.*" (Italics supplied.) Provision is expressly made, therefore, for compliance with state laws when the interests of interstate commerce are not affected. In this case the Commission has determined that commerce is affected by the construction of the proposed project, and there is no issue whatsoever presented by the Commission's opinion and order as to the fact that waters of the United States are involved. By its own expressed terms, Chapter 363 of the 1939 Iowa State Code as stated in Section 7776, can only apply to "the waters of the state."

The description of the project set forth above demonstrates that Section 7771 of the 1939 Iowa Code could not be complied with if effect is to be given to the Federal Power Act. Section 7771 requires that any water taken from the stream in connection with the project must be returned thereto at the nearest practical point. If his mandate were adhered to, it would be impossible "to utilize the head and water available." * Section 10 (a) of the Federal Power Act requires that a license be issued only when

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* Page 46, Federal Power Commission Opinion, No. 110, "The present plans call for a practical and reasonably adequate development to utilize the head and water available, create a large storage reservoir, and make available for recreational purposes a considerable area now unsuitable for such use, all at a cost which does not appear to be unreasonable."

[fol. 45] "in the judgment of the Commission [the project] will be best adopted to a comprehensive plan for improving or developing a water-way or water-ways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval."

Compliance with Section 7771 would defeat the comprehensive plan (approved herein by the Federal Power Commission) for using a water-way for the improvement and utilization of water power development and for recreational purposes. If it is conceded (which we deny) that Section 7771 of the Iowa Code applies to waters of the United States, it becomes perfectly obvious that said section supersedes and renders meaningless the will of Congress and the paramount authority of the Federal Government as expressed in Section 10 (a). Such construction would render the Iowa statute inoperative, invalid, and unconstitutional. And an interpretation of section 9 (b) of the Federal Power Act, which would require compliance with Section 7771 of the 1939 Iowa Code, would be inconsistent with the legislative history of Section 9(b), the rest of the provisions of the Federal Power Act, and the powers of the Federal Government.

Furthermore, if it is assumed that the applicant is required to obtain a license from the State of Iowa in accordance with the provisions of Chapter 363 of the Iowa Code, the following untenable conditions would result: Under Section 7776 the Executive Council is empowered to investigate and approve or disapprove the methods of construction, operation and maintenance of dams. Section 7793 [fol. 46] provides that no permit granted by the Executive Council shall be perpetual, but that it shall be subject to restrictions, cancellation and regulation by legislative action. It is obvious that the provisions of this chapter would place the Executive Council in a position to dictate to a person receiving a permit the type of dam to be constructed. The Federal Power Commission also has supervision over the construction, operation and maintenance of power projects. A situation would thereupon exist in which the

exercise of the powers of the Federal Power Commission, and therefore of the United States, would be dependent upon the action of the state in approving or disapproving the construction of the dam. The entire power program of the Federal Government not only upon the Cedar River and the Mississippi River, but upon any other river in or adjacent to Iowa used for power purposes, would be subject to the control of the state. Certainly such was not the intention of Congress.

4. The opinion and order of the Commission in dismissing petitioner's application for license is arbitrary and capricious, and the applicant is aggrieved and adversely affected in that the Commission failed to find on the basis of testimony of a witness who has practiced law in Iowa for many years, and who is thoroughly familiar with the statute and common law of Iowa, that applicant has complied with all laws of Iowa as required by Section 9 (b).

5. The order of the Commission dismissing the application for license herein is arbitrary and capricious in that the Commission's finding that the applicant has not presented satisfactory evidence, pursuant to Section 9 (b) of the Federal Power Act of compliance with the requirements of applicable laws of the State of Iowa requiring a permit from the State Executive Council to effect the purposes of a license under the Federal Power Act, is not supported by [fol. 47] any evidence and is contrary to law, and the applicant is aggrieved and adversely affected by the order of dismissal based upon said finding.

Petitioner therefore prays that this Honorable Court may review said order and enter a judgment setting said order aside and that such other orders may be made herein as to the Court may seem just.

First Iowa Hydro Electric Cooperative, by (S.) F. A. E. Gillmor, President. Porter & Haley, by (S.) George B. Porter, and (S.) Andrew G. Haley, Counsel for Petitioner.

Duly sworn to by F. A. E. Gillmor. Jurat omitted in printing.

[fol. 48] [Stamp:] United States Court of Appeals for the District of Columbia. Filed Jul. 10, 1944. Joseph W. Stewart, Clerk

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 8752

FIRST IOWA HYDRO-ELECTRIC CO-OPERATIVE, Petitioner,

v.

FEDERAL POWER COMMISSION, Respondent

MOTION OF STATE OF IOWA FOR LEAVE TO INTERVENE.

To the Honorable, the Chief Justice and Associate Justices of the United States Court of Appeals for the District of Columbia:

The State of Iowa, one of the sovereign states of the United States of America, moves for leave to intervene in this cause under Rule 38(c) of the General Rules of this Court and shows:

The petitioner herein on or about August 11, 1941, filed before the respondent its petition for a license to construct a hydro-electric project on and near the Cedar River in Muscatine County, Iowa. The proposed project involves the construction of a dam across the said river about twenty-five miles above its confluence with the Iowa River, [fol. 49] the formation of a large reservoir back of the dam and the diversion of the water impounded in the reservoir through a canal into the Mississippi River, and not returning the water to the Cedar River below the dam. Thereafter the State of Iowa filed before respondent its petition to intervene and said petition was granted by the respondent, and the State of Iowa filed its petition of intervention before respondent and did object to the granting of the prayer of petitioner for a license.

That the statutes of the state of Iowa; to-wit, section 7767, Iowa Code 1939, provide as follows:

"No dam shall be constructed, maintained, or operated in this state in any navigable or meandered

stream for any purpose, or in any other stream for manufacturing or power purposes, nor shall any water be taken from such streams for industrial purposes, unless a permit has been granted by the executive council to the person, firm, corporation, or municipality constructing, maintaining, or operating the same."

That the petitioner, which is a private corporation, made no showing before respondent that it had obtained a permit from the executive council of the state of Iowa, and it had in fact not obtained such a permit.

That the statutes of the state of Iowa, to-wit, section 7771, Iowa Code 1939, provide as follows:

"If it shall appear to the council that the construction, operation, or maintenance of the dam will not materially obstruct existing navigation, or materially affect other public rights, will not endanger life or public health, and any water taken from the stream in connection with the project is returned thereto at the nearest practicable place without being materially diminished in quantity or polluted or rendered deleterious to fish life, it shall grant the permit upon such terms and conditions as it may prescribe."

[fol. 50] By reason of said provisions of law and the diversion of water involved in the proposed project of petitioner, the executive council of the state of Iowa could not lawfully grant a permit for the erection of the dam proposed.

Section 9(b) of the Federal Power Act (Section 802, Title 16, U. S. C. A.) requires an applicant for license to submit to the Commission satisfactory evidence that the applicant has complied with the requirements of the laws of the state within which the proposed project is to be located with respect to bed and banks, and to the appropriation, diversion, and use of water for power purposes.

It is the contention of the state of Iowa that the applicant was not entitled to a license because of its failure to meet the requirements of said section 9(b) of the Federal Power Act, and that the order of the respondent Federal Power Commission, dismissing petitioner's application was correct and should be sustained in this court, and that the petition for review should be dismissed, or in the alter-

native, the order of the respondent Federal Power Commission, should be affirmed.

The State of Iowa, as an intervenor, through its duly constituted instrumentalities, actively resisted the application of petitioner before the respondent throughout the proceedings.

The State of Iowa, through its legislative body, the General Assembly, and by the enactment into law of the statutes of the State of Iowa hereinbefore set out, has declared its public policy with reference to the construction of dams across streams within the borders of the state, for [fol. 51] the protection of its citizens and the preservation of its resources.

The National Congress in the enactment of the Federal Power Act recognized this right of the sovereign states to declare their public policy with reference to streams within their borders, by the provisions of said section 9(b) of said act.

The State of Iowa has a vital interest in the protection of its citizens and preservation of its resources through the operation of its duly enacted laws. The executive council of the state of Iowa has determined that the State of Iowa should intervene herein in order to protect its interests and there is attached hereto copy of the resolution adopted by the said executive council on July 5, 1944.

The State of Iowa, by John M. Rankin, Attorney General of Iowa; Floyd Philbrick, First Assistant Attorney General of Iowa.

[fol. 52] (Copy of resolution adopted by the Executive Council of the State of Iowa on July 5, 1944.)

Whereas, on August 11, 1941, the First Iowa Hydro-Electric Co-operative filed before the Federal Power Commission a petition for license to construct a hydro power project on and near the Cedar River in Muscatine County, Iowa, which on filing was designated by the Federal Power Commission as Project No. 1853, and thereupon on petition by it, the State of Iowa was granted the status of an intervenor therein, and

Whereas, the Federal Power Commission thereafter dismissed the petition for license and the First Iowa Hydro-Electric Co-operative has now filed in the United States Court of Appeals for the District of Columbia a petition against the Federal Power Commission asking for a review

of the said order of the Commission which dismissed the petition for license, and

Whereas, it is vital to the interests of the State of Iowa that the said order of the Commission be sustained,

Be It Resolved by the Executive Council of the State of Iowa that the State of Iowa should intervene in the matter before the said United States Court of Appeals for the District of Columbia and thereby take steps to sustain the said order of the Federal Power Commission, and the Attorney General of Iowa is directed to take such steps as may be appropriate to intervene in said matter in the United States Court of Appeals for the District of Columbia for the purpose of protecting the interests of the State of Iowa.

[fol. 53] CERTIFICATION OF SERVICE

STATE OF IOWA,
Polk County, ss:

I, Floyd Philbrick, being first duly sworn, on my oath depose and say: that I am First Assistant Attorney General of the State of Iowa; that the attached Motion of State of Iowa for Leave to Intervene has been served by mailing a true copy thereof by registered mail as follows:

1. On the First Iowa Hydro-Electric Co-operative, petitioner, by such mailing to Porter & Haley (of record counsel for petitioner), Earle Building, Washington, D. C.

2. On the Federal Power Commission, Respondent, by such mailing to the Federal Power Commission, Washington 25, D. C., attention Mr. J. H. Gutride, Acting Secretary,

said mailings being made on the 6th day of July, 1944, from Des Moines, Iowa.

Floyd Philbrick.

Subscribed and sworn to before me this 6th day of July, 1944.

Oscar Strauss, Notary Public in and for the County of Polk, State of Iowa.

[fol. 54] [Stamp:] United States Court of Appeals for the District of Columbia. Filed Sep. 30, 1944. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA—April Term, 1944

No. 8752

FIRST IOWA HYDRO-ELECTRIC CO-OPERATIVE, Petitioner,

vs.

FEDERAL POWER COMMISSION, Respondent.

Before: Groner, C. J., and Edgerton and Arnold, J.J.

ORDER

On consideration of the motion of the State of Iowa for leave to intervene in the above-entitled case, and of petitioner's objections, and the answer thereto, It is.

Ordered by the Court that the State of Iowa be, and it is hereby, allowed to intervene in this cause, and may file a brief within 20 days.

Per CURIAM:

Dated September 30, 1944.

[fol. 55] Friday, February 23rd, A. D., 1945

The Court met pursuant to adjournment. Present: Honorable D. Lawrence Groner, Chief Justice, and Honorable Harold M. Stephens, Justin Miller, Henry W. Edgerton and Thurman Arnold, Associate Justices.

Before Honorable D. Lawrence Groner, Chief Justice, and Honorable Justin Miller and Thurman Arnold, Associate Justices.

Proclamation being made, the Court is opened.

January Term, 1945

No. 8752

First Iowa Hydro-Electric Co-operative, Petitioner,

vs.

Federal Power Commission, Respondent, State of Iowa, Intervenor

On motion of Mr. C. Walter Harris, Mr. Neill Garrett, a member of the Bar of the Supreme Court of Iowa, was permitted to argue for the intervenor pro hac vice by special leave of Court.

Argument commenced by Mr. George B. Porter, attorney for petitioner, continued by Messrs. Howard E. Wahrenbrock, attorney for respondent, and Neill Garrett, attorney for intervenor, and concluded by Mr. George B. Porter.

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[fol. 56] [Stamp:] United States Court of Appeals, for the District of Columbia. Filed Aug. 13, 1945. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA

No. 8752

FIRST IOWA HYDRO-ELECTRIC CO-OPERATIVE, Petitioner,

vs.

FEDERAL POWER COMMISSION, Respondent, STATE OF IOWA, Intervenor

On Petition for Review of Order of the Federal Power Commission, Decided August 13, 1945

Mr. George B. Porter, with whom *Mr. Andrew G. Haley* was on the brief, for petitioner.

Mr. Howard E. Wahrenbrock, Assistant General Counsel, Federal Power Commission, with whom *Messrs. Charles F. Shannon*, General Counsel, *Willard W. Gatchell* and *L. W. McKernan*, Principal Attorneys, Federal Power Commission were on the brief, for respondent.

Mr. Neill Garrett of the Bar of the Supreme Court of Iowa, *pro hac vice*, by special leave of Court, with whom *Messrs. John M. Rankin* and *Horace L. Lohnes* were on the brief, for intervenor, State of Iowa. *Mr. C. Walter Harris* also entered an appearance for State of Iowa.

Before Groner, Chief Justice, and Miller and Arnold, Associate Justices.

MILLER, Associate Justice:

Petitioner applied to the Federal Power Commission for a license to construct a power project on Cedar River in the State of Iowa. The Commission dismissed the application for the reason that, "The applicant has not presented satisfactory evidence, pursuant to Section 9(b) of the Federal Power Act,[1] of compliance with the requirements of appli-

[1] 16 U. S. C. A. §802: "Each applicant for a license under this chapter shall submit to the commission * * * (b) satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within

cable laws of the State of Iowa requiring a permit from the State Executive Council to effect the purposes of a license under the Federal Power Act * * *."

On this appeal petitioner admits that it failed to secure a permit from Iowa and contends that it would have been futile to apply for one. The general rule is that administrative remedies must be exhausted before judicial review can be availed of.[2] "One who is required to take out a license will not be heard to complain, in advance of applica- [fol. 57] tion, that there is danger of refusal * * *. He should apply and see what happens."[3]

To escape the operation of this rule, petitioner argues, in the alternative, that: [1] no applicable Iowa law requires one in its position to secure a permit; [2] if the Iowa law[4]

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which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this chapter."

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[2] Red River Broadcasting Co. v. Federal Communications Commission, 69 App. D. C. 1, 3, 98 F. (2d) 282, 284, and authorities cited, n. 3.

[3] Highland Farms Dairy, Inc. v. Agnew, 300 U. S. 608, 616-617; see also Goldsmith v. Board of Tax Appeals, 270 U. S. 117, 123.

[4] The two Sections of Chapter 363 of the Iowa Code (1939), here in dispute, read as follows:

Section 7767—"No dam shall be constructed, maintained, or operated in this state in any *navigable* or meandered stream for *any* purpose, or in any other stream for manufacturing or power purposes, nor shall any water be taken from such streams for industrial purposes, unless a permit has been granted by the executive council to the person, firm, corporation, or municipality constructing, maintaining, or operating the same." [Italics supplied.]

Section 7771—"If it shall appear to the council that the construction, operation, or maintenance of the dam will not materially obstruct existing *navigation*, or materially affect other public rights, will not endanger life or public health, *and any water taken from the stream in connection with*

means what its officials contend, then the law is unconstitutional, and compliance cannot be required. In support of its first proposition, petitioner says that the Iowa Code Sections relied upon by the Commission are not state laws contemplated by Section 9(b) of the Power Act, because by their very terms the authority of the State Executive Council is limited to waters of the State; and because they do not prohibit diversion of water for *power* purposes, but only for *industrial* purposes. Conceivably, Iowa might say that its Legislature intended to speak only of waters navigable according to state classification, although not navigable under Federal classification.[5] While this is a possible interpretation and one which the State might adopt concerning the streams here involved—especially if it were necessary to do so in order to avoid the challenge of unconstitutionality—we are unable to adopt it, in the absence of a decision to that effect by the Iowa courts. Each of the disputed Sections speaks in terms of *navigable* waters. In view of the fact that both State and Federal governments may legislate concerning such waters—each in its own appropriate sphere—we see no reason to give to Chapter 363 the narrow interpretation for which petitioner contends. Again, Section 7771 makes no distinction between power projects and industrial purposes. Its reference to diversion is general rather than special; in fact, it could be just as well argued that the State Legislature was speaking, in this Section, primarily of diversion for power production. Moreover, it can hardly be seriously urged that the State Legislature was concerned over industrial pollution of its streams—because of the probable injurious effect upon public health and destruction of fish and other wild life—while, at the same time, unconcerned over the possible results of complete diversion of water from its streams. The reference to pollution is, in fact,

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the project is returned thereto at the nearest practicable place without being materially diminished in quantity or polluted or rendered deleterious to fish life, it shall grant the permit upon such terms and conditions as it may prescribe." [Italics supplied.]

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[5] Shortell v. Des Moines Electric Co., 186 Iowa 469, 172 N. W. 649.

secondary to the primary requirement concerning diversion; and some diversion usually occurs in connection with [fol. 58] power projects. Neither is it reasonable to suppose that the State was concerned only with pollution of streams navigable under state classification as distinguished from other navigable streams. We conclude that the Commission properly rejected this contention.

Petitioner's second, alternative contention challenges the Iowa law upon the ground of unconstitutionality. It assumes that the jurisdiction of the Federal government over navigable streams, in so far as the licensing of power projects is concerned must be exclusive in nature, requiring a uniform rule of regulation and excluding, altogether, state regulatory legislation. We conclude that this contention and the assumption upon which it is based are unsound. Where Congress, while regulating related matters, has purposely left untouched a distinctive part of a subject which is peculiarly adapted to local regulation, the state may legislate concerning such local matters which Congress could have covered but did not.[6] The fact that particular phases of an interstate activity have long been regulated by states, has been recognized as a strong reason why, in the continued absence of conflicting Congressional action, the state regulatory laws should be declared valid.[7] The same reasoning should apply where Congress, having newly decided to enter a particular field of interstate commerce, leaves untouched regulatory state laws concerning part of the area. Where the Federal law *authorizes* state action, such action is permissible even as to matters which could otherwise be regulated only by uniform national enactments.[8]

In enacting the Federal Power Act, it was not the intention of Congress that the Federal government should occupy the field completely, or that the states should be excluded. On the contrary, the Act contemplates a dual system of control and the exercise of appropriate powers by the State,

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[6] See Hines v. Davidowitz, 312 U. S. 52, 68, and authorities there cited.

[7] United States v. South-Eastern Underwriters Association, 322 U. S. 533, 548-549, n. 32.

[8] Cloverleaf Butter Co. v. Patterson, 315 U. S. 148, 155, and authorities there cited.

as well as by the Federal government.[9] This is the plain purpose of Section 9(b). It is revealed, also, by other sections of the Act.[10]

Petitioner's contention—upon the ground of unconstitutionality—depends also upon the assumption that the disputed Iowa Code Sections constitute an absolute bar to its project, hence that their effect is to defeat the jurisdiction of the Federal government and the purposes of the Power Act. This contention must be rejected, also. It is the duty of courts to avoid the issue of constitutionality if the statute which is being interpreted is susceptible of any reasonable interpretation consistent with constitutionality.[11] All parties agree that Iowa's courts have not, so far, been faced [fol. 59] with this issue. We see several possible interpretations of the disputed Sections which would avoid the issue. For example, upon application properly made to it, the Executive Council might find the "nearest practicable place,"[12] at which the water which is to be diverted for petitioner's project can be returned, is the point at which petitioner proposes to return it; or, perhaps, it might adopt petitioner's suggested interpretation that Chapter 363 has no application to navigable waters of the United States. Again, it will be noted that Section 7771 is so phrased as to vest large discretion in the Executive Council. The next

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[9] United States v. Appalachian Electric Power Co., 311 U. S. 377, 428-429; Alabama Power Co. v. Federal Power Commission, 75 U. S. App. 315, 320, 128 F. (2d) 280, 285; Safe Harbor Water Power Corporation v. Federal Power Commission, 3 Cir., 124 F. (2d) 800, 806-807.

[10] Sections 4 (e), 4 (f), 7 (a), 10 (e), 14, 19, 20, 27; 16 U. S. C. A. §§ 797 (e), 797 (f), 800 (a), 803 (e), 807, 812, 813, 821.

[11] Crowell v. Benson, 285 U. S. 22, 62, and authorities cited; Buttfield v. Stranahan, 192 U. S. 470, 492; Nicol v. Ames, 173 U. S. 509, 514; United States v. Gettysburg Electric Railway, 160 U. S. 668, 680; Lewis Publishing Co. v. Morgan, 229 U. S. 288, 311.

[12] See Iowa Code (1939) c. 363, § 7771.

succeeding Section, 7772,[13] is phrased in negative terms: "No permit shall be granted * * *." Evidently the Legislature intended that failure to secure a certificate of the State Department of Health should bar the issuance of a permit. The contrast between the two Sections is striking. While no departure from the requirements of the second is permissible, it is entirely within the range of probability that a court would so interpret the first Section as to allow the issuance of a permit without strict compliance with all its terms; especially if it were necessary to do so in order to avoid unconstitutionality.[14] In any event, as the Power Act places upon petitioner the affirmative duty of showing compliance with state laws, it must assume their constitutionality, make its application for a permit and pursue such remedies as may be available in the state, to establish its right to issuance of the permit. Until it has done so, it is in no position to challenge an order of the Commission, which is based upon its failure to do so.

On this appeal the Commission argues that the Iowa statute is invalid.[15] It does so, however, not on petitioner's

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[13] Iowa Code (1939) c. 363, § 7772: "No permit shall be granted for the construction or operation of a dam where the water is to be used for manufacturing purposes, except to develop power, until a certificate of the state department of health has been filed with the council showing its approval of the use of the water for the purposes specified in the application."

[14] Cf. Nicol v. Ames, 173 U. S. 509, 514 et seq.; Buttfield v. Stranahan, 192 U. S. 470, 492 et seq.; Consumers Union of United States v. Walker, — U. S. App. —, —, 145 F. (2d) 33, 35.

[15] The Commission's position, as set out in its brief, is that the sole basis of its dismissal order was its finding that petitioner had failed to submit satisfactory evidence of compliance; but that Section 9 (b) of the Power Act does not require compliance with an invalid state law (United States v. Bellingham Bay Boom Company, 176 U. S. 211, 217, 218); that the lawfulness of its order depends upon the validity of the Iowa law, which was assumed by it because, as an administrative agency, it was without power to make a judicial determination of the question, or to disregard the presumption of validity of such laws (Davies Warehouse Co. v. Bowles, 321 U. S. 144, 153).

theory that Iowa invaded, or continued to occupy, an area absolutely prohibited to it by the Constitution, but rather that Congress, having elected to exercise, in part, the power delegated by the Commerce Clause, excluded the states from the area, proportionately to its exercise of power. It says, specifically, that the disputed Code Sections conflicted with the Power Act and were superseded by it;[16] that to require petitioner's compliance with Chapter 363 of the Iowa Code [fol. 60] would oust the United States of jurisdiction and defeat the primary objectives of the Power Act.[17]

The question thus presented is a difficult one. On the one hand, it is necessary that full scope shall be given to the Power Act in order that its beneficent purposes may be

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[16] See Hines v. Davidowitz, 312 U. S. 52; Cloverleaf Butter Co. v. Patterson, 315 U. S. 148.

[17] 56 Cong. Rec. 9109 (1918), Congressman LaFollette, speaking on behalf of the Bill, said: "This, Mr. Chairman, brings me back to my first premise: That we should understand the genesis of this legislation; the reason for its coming into being and need for its enactment. We have for many years been trying to develop more or less power from rushing or falling water in many States of the Union, and many power possibilities would have long ago been developed and be giving service to man if it were not for a divided authority. While the right of water control and the ownership and jurisdiction of bed and banks of our watercourses are admittedly in the States, the jurisdiction over the navigation of all streams being in the Government the States could not well pass laws conferring upon private individuals rights to build dams across the streams, because the Government could intervene and stop proceedings under the plea of control of navigation. It is true that some of the States have granted such rights, and dams have been built, and their legality upheld by the courts, and there have been many interesting questions raised and decisions rendered; but time forbids my going into that phase of this question. Building dams and developing water powers is usually a hazardous and costly undertaking. Men will not engage in it on uncertainties. Consequently with indefiniteness of tenure and occupation created by dual or divided authority, but little development has been made. * * * This bill is brought here because it is apparent that we can

achieved in the expansion of our national economic life.[18] On the other hand, the established interests of the states and of their citizens must be protected and preserved so far as is possible,[19] in accomodating the one to the other. To answer the question, we are required to enter an area of controversy to which the Supreme Court has referred as

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get no development under a divided authority, and development is needed. Our not having greater development is inexcusable on any other ground than lack of grasp of the situation and inability to cope with it. This bill is not based on either the Government's ownership or its sovereign authority, but on the hypothesis that we as representatives of the States have authority to act for the States in matters of this character and pass laws for the general good, by the establishment of a limited trusteeship or commission composed of officials of the Government, to carry out and administer this law in such a way as not to infringe any of the rights of the St tes nor to impede or restrict navigation, but rather to benefit it."

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[18] Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U. S. 508.

[19] Colorado v. Kansas, 320 U. S. 383, 392; Nebraska v. Wyoming (decided June 11, 1945), — U. S. —, —, —, 13 U. S. L. Week 4498, 4502, 4504.

[20] United States v. Appalachian Electric Power Co., 311 U. S. 377, 423: "The briefs and arguments at the bar have marshalled reasons and precedents to cover the wide range of possible disagreement between Nation and State in the functioning of the Federal Power Act. To predetermine, even in the limited field of water power, the rights of different sovereignties, pregnant with future controversies, is beyond the judicial function. The courts deal with concrete legal issues, presented in actual cases, not abstractions. The possibility of other uses of the coercive power of license, if it is here upheld, is not before us. We deem the pictured extremes irrelevant save as possibilites for consideration in determining the present question of the validity of the challenged license provisions. To this we limit this portion of our decision."

"the wide range of possible disagreement between Nation and State in the functioning of the Federal Power Act."[20]

The best we can do, under the circumstances, is to apply the standards which have been used by the Supreme Court, in analogous cases. Summarized briefly, the generally applicable principles are as follows: [1] When the question is whether a Federal act—within admitted Federal authority—overrides a state law, the rule is clear that state [fol. 61] action may be excluded by clear implication or inconsistency,[21] just as well as by express language. In answering the question, however, the entire scheme of the statute must be considered.[22] [2] The expression of a purpose to limit the exertion of state power in some respects strongly suggests that Congress intended not otherwise to trammel the exercise of state power, in the same area.[23] [3] When the prohibition of state action is not specific but merely inferable from the scope and purpose of the Federal legislation, it must be clear that the Federal provisions are inconsistent with those of the state to justify the thwarting of state regulation.[24] [4] Congressional intention to displace local laws in the exercise of the commerce power is not, in general, to be inferred unless clearly indicated by considerations which are persuasive of the statutory purpose.[25] [5] in ascertaining the scope of such legislation, a proper adjustment of the local and national interests must be, always, in the background.[26] To this end the primary test to be applied is not the mechanical one of whether the particular activity affected by the state law is part of interstate commerce, or the arbitrary one of whether the Federal legislation can be stretched to cover a particular project, but, rather, whether the over-all, competing demands of the state and national interests involved can be accommodated.[27]

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[21] Cloverleaf Butter Co. v. Patterson, 315 U. S. 148, 157.

[22] Savage v. Jones, 225 U. S. 501, 533.

[23] Mintz v. Baldwin, 289 U. S. 346, 351.

[24] Cloverleaf Butter Co. v. Patterson, 315 U. S. 148, 156, and authorities there cited.

[25] Maurer v. Hamilton, 309 U. S. 598, 614.

[26] Federal Trade Commission v. Bunte Brothers, Inc., 312 U. S. 349, 351.

[27] United States v. South-Eastern Underwriters Association, 322 U. S. 533, 548, and n. 31.

[6] The interest of the state in securing compliance with its statutes must be balanced against the effect of such control on interstate commerce in its national aspect.[28] [7] Absorption of state authority is, necessarily, a delicate exercise of legislative policy to achieve a wise adjustment between the needs of central control and the maintenance of strong local institutions.[29] [8] Where a Federal agency is authorized to invoke an overriding Federal power, except in certain prescribed situations, and then to leave the problem to traditional state control, the existence of Federal authority to act should appear affirmatively and not rest on inference alone.[30] This rule is applicable to the Federal Power Commission.[31]

Sometimes it is the purpose of Congress, in enacting legislation for the regulation of interstate commerce, to strengthen and assist state control and regulation, rather than to impair or diminish it.[32] The legislative history of [fol. 62] the Federal Power Act reveals such an intention.[33] Consequently, we should not find in it contrary radiations, beyond the obvious meaning of its language, unless otherwise its major purpose would be defeated.[34]

The licensing authority of the Commission is broadly stated in the Power Act to cover projects which are "best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of inter-

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[28] Illinois Natural Gas Co. v. Central Illinois Public Service Co., 314 U. S. 498, 506.

[29] Palmer v. Massachusetts, 308 U. S. 79, 84: "Therefore, in construing legislation this court has disfavored inroads by implication on state authority and resolutely confined restrictions upon the traditional power of states to regulate their local transporation to the plain mandate of Congress."

[30] Yonkers v. United States, 320 U. S. 685, 692.

[31] The Connecticut Light and Power Company v. Federal Power Commission, (decided March 26, 1945) — U. S. —, —, 13 U. S. L. Week, 4265, 4268.

[32] Federal Power Commission v. Hope Natural Gas Co. 320 U. S. 591, 610.

[33] Jersey Central Power & Light Co. v. Federal Power Commission, 319 U. S. 61, 76.

[34] See Federal Trade Commission v. Bunte Brothers, Inc., 312 U. S. 349, 351.

state or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes; * * * ." To the extent that a state law places *any* obstacle in the way of that broad objective it may be said to conflict with the Power Act.[35] But that is not enough to show that the state law has been superseded. The Commission recognizes that the Act limits its powers in some respects; that by express limitation the Act "saves" some state laws from supersedure. Its theory may be summarized as follows: [1] In enacting the Power Act, Congress assumed that the usual rules as to supersedure would apply to state laws; [2] accordingly, it was necessary to include in the Act explicit provisions to "save" those state laws which Congress wanted to leave in effect; [3] thus, Section 27 specifically provided that nothing in the Act "shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating *to the control, appropriation, use, or distribution of the water used in irrigation or for municipal or other uses* * * *" [Italics supplied]; [4] in contrast, Section 9 (b) of the Act merely provides for the submission of information to the Commission by an applicant for a license, *i. e.*, satisfactory evidence that it has complied with the requirements of state laws "with respect to bed and banks and to the appropriation, *diversion* and use of water for power purposes * * *"

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[35] Federal Power Act § 10 (a), 16 U. S. C. A. § 803 (a); See also § 7 (a), 16 U. S. C. A. § 800 (a): "In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section 15 hereof the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans." See generally § 4, 16 U. S. C. A. §797.

[Italics supplied]; [5] accordingly, Section 9 (b) does not indicate any Congressional intention to "save" a state law which would otherwise be superseded by the Federal Power Act because in conflict with the objectives of the Act.

We cannot agree with the Commission's conclusion as to the effect of Section 9 (b). This Section is the one which expresses the major intention of Congress that the States and the National Government shall participate jointly in the development and regulation of water power projects. It just as effectively "saves" state laws "with respect to bed and banks [of streams] and [with respect] to the appropriation, diversion and use of water for power purposes" [fol. 63] as does Section 27 with respect to laws "relating to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses."

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[5] The bill (S. 1419) as it passed the Senate contained this provision: "* * * before the permit shall be granted under this act, the permittee must first obtain, in such manner as may be required by the laws of the States, the consent of the State or States in which the dam or other structure for the development of water power is proposed to be constructed."

The Senate bill was rejected by the House but the substitute House bill (H. R. 8716) as it was reported by the committee provided that an applicant for a license should submit to the proposed commission: "Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power and in any other business necessary to effect the purposes of a license under this Act."

Section 9 (b) was amended to its present form by the House upon motion of Representative LaFollette, who, speaking on behalf of his amendment, said: "Mr. Chairman, in this section, by the provision that the applicant for a license shall have complied with the rules and laws of the State in regard to the diversion of water, we are trying not to infringe the rights of the States in that respect, and I wish to call the attention of the committee to the fact that many Supreme Court decisions in respect to States' rights as to water also refer to States' rights as to the beds

Any other interpretation would lead to unjust, if not absurd, results.[2]

In recognizing and safeguarding the concurrent interest of the states in hydroelectric developments, it was not the purpose of Congress to require their consent to the construction and operation of such projects, or to give to the states a veto power over them. The Federal Power Act contemplates cooperative action toward a common, beneficial end. There is no reason—revealed in the Act or otherwise—why states in which water is used primarily for irrigation should stand in any different relation to the National Government, in this respect, than states in which water is used primarily for other purposes. Consequently, if one state should, under the title of irrigation laws, provide, arbitrarily, that no Federal water power project could be constructed or operated within its boundaries, that law would be just as fatally inconsistent with the Federal Power Act as would a similar enactment, in any other state, under any other title. On the other hand, it was not

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and banks, and I would like to read from the latest United States Supreme Court decision upon this question, delivered on May 12, 1917. The opinion was delivered by Mr. Justice Pitney, and in that he says: 'The States have authority to establish for themselves such rules of property as they may deem expedient with respect to the streams of water within their borders, both navigable and nonnavigable, and the ownership of the lands forming their beds and banks.' In many States the law gives the riparian owner title to the middle of the stream. In other States only to the high-water mark. The property rights are within the State. It can dispose of the beds, or parts of them, regardless of the riparian ownership of the banks, if it desires to, and that has been done in some States. If we put in this language, which is practically taken from that Supreme Court decision, as to the property rights of the States as to the bed and the banks and to the diversion of the water, then it is sure that we have not infringed any of the rights of the States in that respect, or any of their rules of property * * *." 56 Cong. Rec. 9810 (1918).

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[2] *Cf.* Consumers Union of United States v. Walker, —, U. S. App. —, —, 145 F. (2d) 33, 35, and authorities cited.

the purpose of Congress that the Commission should ride roughshod over any state, whatever the nature of its water laws, or give to a private corporation, licensed by it, the [fol. 64] plenary power of eminent domain,[38] unless that corporation had first subjected itself to the state control[39] which protect the rights, powers, privileges and immunities of its other citizens. Carrying petitioner's argument to its logical conclusion, it would follow that if the Commission could be persuaded to make appropriate findings, a licensee might, by so specifying in its application, take over the State House for its headquarters office or flood the capital city for a storage basin.[39]

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[38] Federal Power Act § 21, 16 U. S. C. A. § 814: "When any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain * * *."

[39] United States v. Southern Power Co., 4 Cir., 31 F. (2d) 852, 856: "While it is well settled that land devoted to a public use may be taken for another public use under the power of eminent domain, it is equally well settled that this may not be done, unless the intention of the Legislature to that effect has been manifested in express terms or by necessary implication. * * * It is true that this rule is ordinarily applied in grants of power to public service corporations, and not where the power is being exercised by the state itself for its immediate purposes. * * * But it is based, not upon any lack of power upon the part of the government, but upon the presumed intention of the Legislature, and should be held to apply in condemnation proceedings, even by the state itself, where the prior public use could not reasonably interfere with the purpose for which condemnation is authorized." The right of eminent domain is a sovereign one inherent in the Federal Government and may be exercised without the consent of a state: Kohl v. United States, 91 U. S. 367; Chappell v. United

In this connection the intervenor calls to our attention, as an additional reason for upholding the Commission's order, Section 7796 of the Iowa Code which reads as follows: "Whenever the erection of any such dam will affect highways or state-owned lands, the applicant shall as a condition precedent secure a permit from the board, commission, or other official body charged with jurisdiction over and control of said highways or state owned lands." The intervenor says, and petitioner does not deny, that shown in the descriptive statement of the proposed project, submitted to the Power Commission, many portions of the United States and State primary highways will be flooded; that, in the event the project is constructed, those highways will have to be rerouted and reconstructed; that petitioner admits it has made no application for the permit required [fol. 65] by Section 7796.[49] Nothing appears in the record to excuse petitioner's failure to comply with Section 7796. For this reason alone, therefore, the Commission's order must stand.

States, 160 U. S. 499, 510. The fact that land within the state is already devoted to a public use does not limit the Federal Government's power to condemn: United States v. Gettysburg Electric Railway, 160 U. S. 668, 681. It may condemn public property held in a governmental or proprietary capacity by the states or their instrumentalities: Jefferson County, Tenn., v. Tennessee Valley Authority, 6 Cir., 146 F. (2d) 564 (roads and highways), United States v. Town of Nahant, 1 Cir. 153 F. 520 (sewers and water pipes), United States v. 4,450.72 Acres of Land, D. Minn., 27 F. Supp. 167 (state game preserve), Missouri v. Union Electric Light & Power Co., D. C. C. D. Mo., 42 F. (2d) 692 (land occupied by county courthouse and jail), United States v. Jotham Bixby Co., D. C. S. D. Calif., 55 F. (2d) 317, *aff'd sub nom.*, C. M. Patteni & Co. v. United States, 9 Cir., 61 F. (2d) 970, *dismissed as moot*, 289 U. S. 705 (municipal park), Stockton v. Baltimore & N. Y. R. R., C. C. D. N. J., 32 F. 9, 19, 20, *appeal dismissed*, 140 U. S. 699 (tide lands held by state in trust for public); Town of Bedford v. United States, 1 Cir., 23 F. (2d) 453 (road), Georgia v. Chattanooga, 264 U. S. 472 (state owned railroad property in another state).

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[49] Maurer v. Hamilton, 309 U. S. 598, 614.

But apart from Section 7796, and considering only the two Sections upon which appellant and appellee have made the case to turn, Sections 7767 and 7771, we conclude that the area of law covered thereby is so obviously within the domain of the state's power that Congressional intention, to supersede the disputed state laws, must much more clearly appear [41] than it does in the Power Act. The maintenance of running streams, the preservation of wildlife, the rights of riparian owners, long-established land titles,[42] drainage, sewage and industrial waste disposal; these and many other problems of public health and public policy are involved. These are problems which should be worked out by diplomatic adjustment of state and national interests.[43] The Commission's licensee should be an agent toward this end, rather than an antagonist of the state and its other citizens.

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[41] See Florida v. United States, 282 U. S. 194, 211-212.

[42] Hardin v. Jordan, 140 U. S. 371, 380-381; Speech of Representative LaFollette, speaking on Section 9 (b), 56 Cong. Rec. 9810 (1918), *supra*, note 36.

[43] Parker v. Brown, 317 U. S. 341, 362-363: "When Congress has not exerted its power under the Commerce Clause, and state regulation of matters of local concern is so related to interstate commerce that it also operates as a regulation of that commerce, the reconciliation of the power thus granted with that reserved to the state is to be attained by the accommodation of the competing demands of the state and national interests involved. * * * Such regulations by the state are to be sustained, not because they are 'indirect' rather than 'direct', * * * not because they control interstate activities in such a manner as only to affect the commerce rather than to command its operations. But they are to be upheld because upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities, and which, because of its local character, and the practical difficulties involved, may never be adequately dealt with by Congress. Because of its local character also there may be wide scope for local regulation without substantially impairing the national interest in the regulation of commerce by a single authority and without materially obstructing the free flow of commerce, which were the principal objects sought to be secured by the Commerce Clause."

It may be noted in passing that we are not concerned in this case with a situation in which Congress has elected to exercise the full power delegated by the Constitution.[44] The present case involves no more than the expressly limited powers of a government agency to license a private corporation which seeks to operate under the restrictive provisions of the Power Act. Needless to say, no findings or decision of the Commission could enlarge the scope of the Act or increase the Commission's power under it. It would serve no useful purpose, for example, to produce electric power—thus carrying out the beneficent objective of the Federal Power Act—if by so doing the community to be served with electricity were turned into a barren, unpopulated waste. Again, if the result of constructing a power project were to strip one state of its water in order to serve the needs of another, it would require convincing evidence of legislative intention to justify it. If Congress wished to produce such results it would speak clearly and unmistagably. On the contrary, it has required an applicant to show that he has complied with the state laws. We think it [fol. 66] meant compliance, not information that he has failed to comply.

A situation closely analogous to that of the present case may be found in *Maurer* v. *Hamilton*[45] where the Supreme Court was required to reconcile or strike down a Pennsylvania law whose purpose was to protect its people and its highways. It chose the former alternative. That case involved the Federal Motor Carrier Act[46] which, in Section 204, conferred upon the Interstate Commerce Commission authority to regulate "safety of operation and equipment" of motor vehicles used by carriers in interstate commerce. Section 225 of that Act reserved to the states power to regulate "sizes and weight" of motor vehicles. It was

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[44] Cf., Kohl v. United States, 91 U. S. 367, 374; United States *ex rel.* Tennessee Valley Authority v. Powelson, 319 U. S. 266, 279; Cloverleaf Butter Co. v. Patterson, 315 U. S. 148, 154 156, and authorities cited; see Collins v. Yosemite Park & Curry Co., 304 U. S. 518, 530; Silas Mason Co. v. Tax Commission of Washington, 302 U. S. 186, 203; James v. Dravo Contracting Co., 302 U. S. 134, 147.

[45] 309 U. S. 598.

[46] 49 Stat. 543 (1935), 49 U. S. C. A. §§ 301-327.

contended that the Pennsylvania statute, which prohibited the operation over its highways of any motor vehicle carrying any other vehicle over the head of the operator of such carrier vehicle, was superseded by rules and regulations promulgated by the Commission under the Motor Carrier Act. The Interstate Commerce Commission had interpreted the law in such manner as to permit such carriage. The Pennsylvania law constituted an insurmountable obstacle to it. The Supreme Court held there was no supersedure.[47] The test, then, is not whether a state law happens to block action which a Federal agency may chance to approve. Instead, it is whether the state law frustrates the operation of the Federal law, prevents accomplishment of

[47] Maurer v. Hamilton, 309 U. S. 598, 610-611: "But the question remains whether the Pennsylvania statute is a regulation of 'size and weight' within the meaning of § 225, or whether it is a regulation of 'safety of operation and equipment,' which the Commission was authorized to make by § 204 (1) (2). Perusal of the present record can leave no doubt that in both a technical and a practical sense § 1033 (c) is a regulation of weight and size of the loaded motor vehicle, and that the Pennsylvania Legislature intended it to be such. By providing that the carried car shall not be loaded above the cab, the statute sets practical limits to the height of the loaded car and precludes its projection beyond the cab of the carrier car and into the line of vision of its driver. It is also a restriction on weight distribution of the loaded car and in its amended form specifically prohibits placing the 'weight' of the carried car above the driver. The highest court of the state has declared that such are the purposes of subsection (c), in order to avoid the safety hazards resulting from improper weight distribution and the height of the carried car at a point where it cannot be observed by the driver. As interpreted and applied by the state court, we can not regard the regulation as other than an exercise of the state's power to protect the safe and convenient use of its highways through the control of size and weight of motor vehicles passing over them, which it was the purpose of § 225 to reserve to the state from the grant of regulatory power to the Commission. Being thus reserved we think it is unaffected by the authority conferred on the Commission by § 204 to regulate 'safety of operation and equipment.'"

its purpose, refuses to its provisions their natural effect;[48] whether, in short, the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[49] If it does, then it must yield. We conclude that no such showing has been made in the present case. The Commission, properly, insisted upon a good faith effort, by its applicant, to comply with the state law.

Mr. Justice Arnold sat during the argument of this case; concurred in the result reached in this opinion, but resigned from the Court before the opinion was completed.

Affirmed.

[fol. 67] [Stamp:] United States Court of Appeals for the District of Columbia. Filed Aug. 13, 1945. Joseph W. Stewart, Clerk.

(Copy)

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, APRIL TERM, 1945

No. 8752

FIRST IOWA HYDRO-ELECTRIC CORPORATION, Petitioner

vs.

FEDERAL POWER COMMISSION, Respondent,

STATE OF IOWA, Intervenor

On Petition for Review of Order of the Federal Power Commission. (Heard before Groner, Chief Justice, and Miller and Arnold, Associate Justices.)

JUDGMENT AND DECREE

This cause came on to be heard on the transcript of the record from the Federal Power Commission, and was argued by counsel.

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[48] Savage v. Jones, 225 U. S. 501, 533; Asakura v. Seattle, 265 U. S. 332; Hines v. Davidowitz, 312 U. S. 52, 67.

[49] Hines v. Davidowitz, 312 U. S. 52, 67; Cloverleaf Butter Co. v. Patterson, 315 U. S. 148, 157; cf. Hill v. Florida, (decided June 11, 1945) — U. S. —, 13 U. S. L. Week 4529.

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the order of the said Federal Power Commission on review in this cause be, and the same is hereby, affirmed.

Per Mr. Chief Justice Groner.

Dated August 13, 1945.

Mr. Justice Arnold sat during the argument of this case; concurred in the result reached in the opinion, but resigned from the Court before the opinion was completed.

[fol. 68] [Stamp:] United States Court of Appeals for the District of Columbia. Filed Aug. 24, 1945. Joseph W. Stewart, Clerk

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 8752

FIRST IOWA HYDRO-ELECTRIC COOPERATIVE, Petitioner,

v.

FEDERAL POWER COMMISSION, Respondent,

STATE OF IOWA, Intervenor

MOTION FOR EXTENSION OF TIME WITHIN WHICH PETITION FOR REHEARING OR PETITION FOR MODIFICATION MAY BE FILED

The Federal Power Commission, Respondent in the above-entitled matter, respectfully petitions this Court for an extension of time to September 10, 1945 within which Respondent may file a petition for rehearing or petition for modification of the opinion entered by this Court on August 13, 1945 and in support thereof represents:

Charles V. Shannon, Howard E. Wahrenbrock, Willard W. Gatchell, and L. W. McKernan appear as counsel of record for Respondent in this matter. Messrs. Shannon and Gatchell are no longer with the Federal Power Commission, having resigned some time prior to August 13, 1945. Mr. McKernan has been on vacation since August 11, 1945 and

still is on vacation. Mr. Wahrenbrock, who argued the case and is the attorney most intimately familiar with this proceeding, has been engaged in the trial of a matter in Omaha, Nebraska, since August 8, 1945 and is still engaged in the trial of that matter. As a result of Mr. Wahrenbrock's engagement, he has had no opportunity to give careful consideration to the opinion and to determine whether [fol. 69] or not a petition for rehearing or petition for modification should be filed, and will have no opportunity to give such consideration to the matter before August 27, 1945.

This motion is, therefore, filed upon Mr. Wahrenbrock's request, not for the purpose of delay but to afford counsel for Respondent an opportunity to consider carefully the opinion and to determine whether a petition for rehearing or petition for modification should be filed.

Wherefore, Respondent prays that the extension of time herein requested be granted.

Done in the City of Washington, District of Columbia, this 24th day of August, 1945.

Federal Power Commission, by Reuben Goldberg, Principal Attorney, Federal Power Commission.

[fol. 70] Acknowledgements of Service

On behalf of First Iowa Hydro-Electric Cooperative, Petitioner, I hereby accept service of the within and aforegoing motion of Respondent and acknowledge receipt of a copy thereof this 24 day of August, 1945.

George B. Porter, For and on behalf of all attorneys for Petitioner.

On behalf of the State of Iowa, Intervenor, I hereby accept service of the within and aforegoing motion of Respondent and acknowledge receipt of a copy thereof this 24 day of August, 1945.

C. Walter Harris, For and on behalf of all attorneys for Intervenor.

[fol. 71] [Stamp:] United States Court of Appeals for the District of Columbia. Filed Aug. 31, 1945. Joseph W. Stewart, Clerk.

(Copy)

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, APRIL TERM, 1945

No. 8752

FIRST IOWA HYDRO-ELECTRIC CORPORATION, Petitioner,

vs.

FEDERAL POWER COMMISSION, Respondent; STATE OF IOWA, Intervenor

ORDER

On consideration of the respondent's motion for extension of time to file petition for rehearing or for modification of the opinion herein to September 10, 1945, It is

Ordered by the Court that the time be, and it is hereby, extended to and including September 15, 1945.

PER CURIAM:

Dated August 31, 1945.

[fol. 72] [Stamp:] United States Court of Appeals for the District of Columbia. Filed Sept. 15, 1945. Joseph W. Stewart, Clerk.

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 8752

FIRST IOWA HYDRO-ELECTRIC COOPERATIVE, Petitioner,

vs.

FEDERAL POWER COMMISSION, Respondent; STATE OF IOWA, Intervenor

PETITION FOR MODIFICATION OF OPINION

The Federal Power Commission, respondent in the above-entitled proceeding, respectfully petitions this Court to

modify the following language in the opinion filed on August 13, 1945 (page 4 of the slip sheet copy):

> "The Commission asks this court to set aside its order and declare the Iowa Statute invalid."

In support of its petition, respondent respectfully shows to this Court the following:

Both in their brief for respondent and in oral argument, Commission counsel sought in every way possible to take and adhere rigorously to the position that: (1) the Commission had properly refused to consider the petitioner's contentions as to the alleged invalidity of Chapter 363 of the Iowa Code; but (2) that that issue was presented to this Court for decision, and (3) while it was inappropriate for counsel for the Commission to urge any position on that [fol. 73] question counsel were submitting a discussion of the scope and objectives of the Federal Power Act, deemed relevant to the decision of the issue presented to this Court.

Nowhere in the brief, and at no time in oral argument, did the Commission, by its counsel ask "this Court to set aside its order and declare the Iowa Statute invalid." On the contrary, in the "Summary of Argument," contained in respondent's brief, respondent stated that "no position is taken in this brief" as to the "validity of the Iowa Statute" (Resp. Br. p. 4) and at page 8 of its brief further stated that "it appears inappropriate for us to urge a position on that question in this brief" since the Commission had "properly refused to consider the merits of petitioner's contentions as to the alleged constitutional invalidity of the Iowa Statute."

While it is the fact that respondent presented "a brief discussion of the scope and objectives of the Federal Power Act" (Resp. Br. p. 9), relevant to the question, respondent clearly stated that the summary discussion was presented merely for "the assistance of the Court" (Resp. Br. p. 9). Moreover, in the "Conclusion" to its brief respondent confined itself solely to a statement that the question of the validity of the State statute was properly before the Court for determination (Resp. Br. p. 15). The same course was carefully followed in oral argument.

In view of the aforegoing it is respectfully submitted that the following sentence more fairly expresses the Commission's position:

> "The Commission in effect argued that the Iowa Statute was invalid, which would require that the Commission's order be set aside."

Wherefore, respondent respectfully requests that the Court modify the language of the opinion hereinabove quoted and referred to.

Federal Power Commission, by Howard E. Wahrenbrock, Assistant General Counsel, Federal Power Commission.

[fol. 74] CERTIFICATE OF SERVICE

I, Howard E. Wahrenbrock, of counsel for Respondent Federal Power Commission, certify that on September 15, 1945, I served copies of the aforegoing petition upon Petitioner First Iowa Hydro-Electric Cooperative by mailing a copy thereof to petitioner's counsel of record, George B. Porter, 1101 Earle Building, Washington, D. C. and upon Intervenor State of Iowa by mailing a copy thereof to intervenor's counsel of record, Horace L. Lohnes, 1111 Munsey Building, Washington, D. C.

Howard E. Wahrenbrock.

[fol. 75] [Stamp:] United States Court of Appeals for the District of Columbia. Filed Sep. 26, 1945. Joseph W. Stewart, Clerk

(Copy)

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, APRIL TERM, 1945

No. 8752

FIRST IOWA HYDRO-ELECTRIC COOPERATIVE, Petitioner,

vs.

FEDERAL POWER COMMISSION, Respondent; STATE OF IOWA, Intervenor

Before: Groner, C. J., and Miller, J.

ORDER

On consideration of respondent's petition for modification of opinion in the above entitled case, It is

Ordered by the Court that the motion be, and it is hereby, granted to the extent of substituting the following sentence for the first sentence of the new paragraph beginning on page 4 of the opinion:

On this appeal the Commission argues that the Iowa statute is invalid.

Per Curiam.

Dated September 26, 1945.

[fol. 76] [Stamp:] United States Court of Appeals for the District of Columbia. Filed Nov. 5, 1945. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 8752

FIRST IOWA HYDRO-ELECTRIC COOPERATIVE, Petitioner,

vs.

FEDERAL POWER COMMISSION, Respondent; STATE OF IOWA, Intervenor

DESIGNATION OF RECORD

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Joint Appendix to petitioner's brief.
2. Motion of State of Iowa for leave to intervene.
3. Order authorizing the State of Iowa to intervene.
4. Minute entry of argument.
5. Opinion of the United States Court of Appeals.
5½. Judgment and Decree.
6. Respondent's motion for extension of time within which petition for rehearing or petition for modification may be filed.
7. Order of United States Court of Appeals on above motion of Respondent.
8. Respondent's petition for modification of opinion.
9. Order of United States Court of Appeals modifying the opinion of the court.
10. This designation of record.
11. Clerk's certificate.

Geo. B. Porter (S.), Attorney for First Iowa Hydro-Electric Cooperative, Petitioner.

[fol. 77] Acknowledgments of Service

On behalf of Federal Power Commission, Respondent, I hereby accept service of the within and foregoing Desig-

nation of Record of Petitioner and acknowledge receipt of a copy thereof this 5th day of November, 1945.

Howard E. Wahrenbrock (S.), Attorney for Federal Power Commission.

On behalf of the State of Iowa, Intervenor, I hereby accept service of the within and aforegoing Designation of Record of Petitioner and acknowledge receipt of a copy thereof this 5th day of November, 1945.

C. Walter Harris (S.), for and on behalf of all attorneys for Intervenor.

[fol. 78] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia, hereby certify that the foregoing pages numbered from 1 to 77, both inclusive, constitute a true copy of the joint appendix of the parties and the proceedings of the said Court of Appeals as designated by counsel for petitioner in the case of: First Iowa Hydro-Electric Cooperative, Petitioner, vs. Federal Power Commission, Respondent, State of Iowa, Intervenor, No. 8752, October Term, 1945, as the same remain upon the files and record of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 6th day of November, A. D. 1945.

Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia. (Seal.)

[fol. 81] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 2, 1946

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

FILE COPY

Office - Supreme Court, U. S.
FILED
NOV 13
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 603

FIRST IOWA HYDRO-ELECTRIC COOPERATIVE, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent.*
STATE OF IOWA, *Intervenor.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

GEORGE B. PORTER
ANDREW G. HALEY
Counsel for First Iowa Hydro-Electric Cooperative, Petitioner.

RALPH U. THOMPSON,
Muscatine, Iowa

JOHN CONNOLLY, JR.
Des Moines, Iowa
Of Counsel for Petitioner

November, 1945.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Federal Power Act of 1920, c. 285, 41 Stat. 1063, amended August 26, 1935, c. 687, 49 Stat. 836, 16 U. S. C. 791a:

Sec. 4(e)	5, 7, 14, 23
Sec. 9(a)	24
Sec. 9(b)	2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 24

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Sec. 9(c) 24
Sec. 10 12
Sec. 11 12
Sec. 13 12
Sec. 23(b) 2, 4, 6, 7, 9, 17, 24
Sec. 27 ..... 4, 15, 25

Iowa Code, Chapter 363 26

Sec. 7767 ..... 5, 8, 11, 26
Sec. 7771 ..... 5, 8, 11, 27
Sec. 7796 ..... 4, 8, 11, 33

MISCELLANEOUS:

Federal Power Commission Finding of June 3, 1941 19
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No.

FIRST IOWA HYDRO-ELECTRIC COOPERATIVE, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*.
STATE OF IOWA, *Intervenor*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

First Iowa Hydro-Electric Cooperative, Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered on August 13, 1945, which affirmed an order of the Federal Power Commission denying a license to Petitioner for the construction and operation of a hydro-electric project upon the Cedar River in the State of Iowa.

OPINIONS BELOW.

The opinion of the Court of Appeals for the District of Columbia (R. 54-72) is reported in 151 F. (2d) 20. The

opinion of the Federal Power Commission is found at R. 11-17.

JURISDICTION.

The judgment of the Court of Appeals for the District of Columbia was entered on August 13, 1945. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 313(b) of the Federal Power Act.

STATUTE INVOLVED.

The pertinent provisions of the Federal Power Act (June 10, 1920, c. 285, 41 Stat. 1063, amended August 26, 1935, c. 687, 49 Stat. 838, 16 U. S. C. 791a) are set forth in the Appendix, *infra*.

QUESTIONS PRESENTED.

Upon consideration of an application filed on August 11, 1941, by Petitioner for a license under Part I of the Federal Power Act to authorize the construction and operation of a power development on the Cedar River in Cedar and Muscatine Counties in the State of Iowa, and extending to the Mississippi River north of Muscatine, Iowa, the Federal Power Commission found that Petitioner had not submitted satisfactory evidence of compliance with laws of the State of Iowa, as required by Section 9(b)[1] of the Federal Power Act, in that Petitioner had not obtained a permit from the State Executive Council authorizing the project. The questions presented are:

1. Whether a state permit is required for the construction of the proposed power project on the Cedar River in the State of Iowa, as provided in Chapter 363 of the Iowa Code of 1939, when, upon a declaration of intention filed pursuant to Section 23(b) of the Federal Power Act to construct the very project here in question, the Federal

[1] Appendix, p. 24.

Power Commission in its Finding of June 3, 1941,[2] (a final determination from which no appeal was taken) found that the Cedar River, and the Iowa River into which the Cedar flows, are navigable waters of the United States; that the interests of interstate commerce would be affected by the construction of the proposed project; that lands of the United States would be flooded and occupied; and that "A license for the construction proposed * * * is required under the provisions of the Federal Power Act."

2. Whether the Federal Power Commission erred in dismising Petitioner's application for a federal license upon the finding that Petitioner "has not presented satisfactory evidence, pursuant to Section 9(b) of the Federal Power Act, of compliance with the requirements of *applicable* law of the State of Iowa requiring a permit from the State Executive Council to effect the purposes of a license under the Federal Power Act, * * *."[3] (Italics supplied)

3. Whether the Court below was in error in holding that Chapter 363 of the Iowa Code of 1939 has valid application in so far as navigable waters of the United States, within the State of Iowa, are concerned.

4. Whether the Court below was in error in holding that Congress in enacting Part I of the Federal Power Act did not completely occupy the field of regulation with respect to the construction, operation and maintenance of hydroelectric projects upon navigable waters of the United States.

5. Whether the Court below erred in holding that "The Commission, properly, insisted upon a good faith effort, by its applicant, [Petitioner herein] to comply with the State law", and in failing to give effect to the opinion of the Attorney General of Iowa that the State Executive

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[2] Appendix, pp. 19-22 (2 F. P. C. 958).

[3] R. 13. (The word "applicable" does not appear in Section 9(b)).

Council could not legally issue a permit to petitioner for the project involved (R. 49).

6. Whether, with respect to navigable waters of the United States within the State of Iowa, Chapter 363 of the Iowa Code of 1939 was superseded by the Federal Water Power Act of 1920, as amended, which became Part I of the Federal Power Act of 1935 by Title II of the Public Utility Act of 1935 (49 Stat. 838).

7. Whether the Court below erred in holding that, with respect to the construction of power projects upon navigable waters of the United States requiring a federal license under Part I of the Federal Power Act, Section 9(b) of the Act, like Section 27, effectively *saved* certain State laws which otherwise would have been superseded.

8. Whether the Court below erred in holding that Section 9(b) of the Federal Power Act, "expresses the major intention of Congress that the States and the National Government shall participate jointly in the development and regulation of water power projects", in view of the express provisions of Section 23(b) and the findings of the Federal Power Commission that a license, in accordance with the provisions of the Federal Power Act, was required for Petitioner's project.[4]

9. Whether the Court below erred in holding that, with respect to the proposed project upon the Cedar River in the State of Iowa, a navigable river of the United States, Petitioner's failure to comply with Section 7796 of the Iowa Code of 1939 which provides that whenever the erection of a dam affects highways, the applicant for a State permit to construct such dam, "shall as a condition precedent secure a permit from the board, commission, or other official body charged with jurisdiction over and control of said highways * * * ", constituted a failure to comply with Section 9(b) of the Federal Power Act and "For this

[4] The Commission's findings are contained in its Order of June 3, 1941. Appendix, pp. 21-22 (2 F. P. C. 958).

reason alone, therefore, the Commission's order must stand." (R. 68)

10. Whether the Court below erred in holding "that the area of law covered" by Sections 7767 and 7771 of the Iowa Code of 1939, is "so obviously within the domain of the State's power that Congressional intention, to supersede the disputed state laws, must much more clearly appear than it does in the Power Act." (R. 69)

11. Whether the Court erred in holding that Chapter 363 of the Iowa Code of 1939 did not "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" as announced in Part I of the Federal Power Act. (R. 72)

12. Whether Sections 7767, 7771 and 7796 of Chapter 363 of the Iowa Code can be separated from context and given effect as separate provisions of law, in disregard of the fact that such sections are but coordinate parts of Chapter 363.

STATEMENT.

The Petitioner.

First Iowa Hydro-Electric Cooperative, the Petitioner, is a non-profit cooperative association, organized under the laws of the State of Iowa and having its office and principal place of business in Muscatine, Iowa.

The Statute.

Under Section 4(e) of the Federal Power Act [16 U. S. C. 797(e)], the Commission is authorized to issue licenses to citizens of the United States or to any corporation organized under the laws of the United States, or of a state thereof, or to any State or municipality, for the purpose of constructing, operating and maintaining dams or other project works necessary or convenient for the development and improvement of navigation and for the development,

transmission and utilization of power derived from any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several states.

Section 23(b) of the Act[5] makes it unlawful to construct, operate or maintain any dam, power house or other work incidental thereto across, along or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States, except under and in accordance with a permit granted prior to June 10, 1920 or a license granted pursuant to the Federal Power Act.

The section further provides that any person intending to construct a dam or other project works across, along or in any stream *other than those defined as navigable waters of the United States* and over which Congress has jurisdiction under its authority to regulate commerce, shall before such construction file a declaration of such intention with the Federal Power Commission. Whereupon the Commission is required to cause immediate investigation of such proposed construction to be made and *if it shall find* that the interests of interstate or foreign commerce would be affected by such proposed construction such person shall not construct, maintain or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of the Federal Power Act. *If the Commission shall not so find*, and if no public lands or reservations are affected, permission is granted to construct such dam or other project works in such stream upon compliance with State laws.

Section 9(b) provides that each applicant for a license under the Act shall submit to the Commission "Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage

[5] Appendix, pp. 24-25.

in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act."

The Proceeding Before the Commission.

On January 29, 1940, Petitioner, as required by Section 23(b) of the Federal Power Act [16 U. S. C. 817], filed a declaration of intention with the Federal Power Commission for a run-of-river hydroelectric development to be located on the Cedar River, in Cedar and Muscatine Counties, Iowa. Thereafter on April 2, 1941, the original declaration of intention was supplemented to extend the power development, by means of a diversion canal, to the Mississippi River north of Muscatine, Iowa. On June 3, 1941, the Federal Power Commission found that the Cedar River, as well as the Iowa River into which the Cedar River flows, are navigable waters of the United States; that the interests of interstate commerce would be affected by the proposed construction; that public lands of the United States would be flooded and occupied; and that "A license for the construction proposed * * * is required under the provisions of the Federal Power Act."[6]

Thereafter, on August 11, 1941, Petitioner filed an application with the Federal Power Commission for a license under Section 4(e) [16 U. S. C. 797(e)] authorizing the construction, operation and maintenance of the proposed power development.

The State of Iowa was permitted to intervene and, after extended hearings, the Commission on January 29, 1944, dismissed Petitioner's application for a license upon the finding that:

> "The applicant has not presented satisfactory evidence, pursuant to Section 9(b) of the Federal Power Act, of compliance with the requirements of applicable laws of the State of Iowa requiring a permit from the

[6] The June 3, 1941, finding of the Federal Power Commission is set forth in the Appendix, *infra*, pp. 19-22 (2 F. P. C. 958).

State Executive Council to effect the purposes of a license under the Federal Power Act, and the pending application, as supplemented, should be dismissed without prejudice." (R. 18)

On February 29, 1944, Petitioner filed an application for rehearing pursuant to Section 313(a) of the Federal Power Act [16 U. S. C. 825L(b)]. Thereafter, on March 7, 1944, the Commission entered an order denying the application for rehearing with the following finding:

"The Commission *finds* that:

"No useful purpose would be served by granting the petition for rehearing and that reconsideration of the order of January 29, 1944, dismissing the application for license would not be appropriate." (R. 27)

The Opinion Below.

On review, the Court below affirmed the Commission's order upon the ground, among others, that Petitioner had not complied with the provisions of Section 9(b) of the Federal Power Act [16 U. S. C. 802(b)], by reason of its failure to obtain a permit from the Executive Council of the State of Iowa authorizing the construction, operation and maintenance of the hydroelectric development in question as provided by Chapter 363 of the Iowa Code; and that Petitioner had otherwise failed to comply with Sections 7767, 7771 and 7796 of Chapter 363 of the Iowa Code.

REASONS FOR GRANTING THE WRIT.

This case is one of vital public significance. The dominant issue underlying the questions presented is whether Section 9(b) of the Federal Power Act, is to be so construed that the State of Iowa, and all other states and territories of the United States, may by statute require a state or territorial permit or license for the construction of a power project, upon navigable waters of the United States, as a condition precedent to the issuance of a federal license un-

der Part I of the Federal Power Act. Chapter 363 of the Iowa Code of 1939 is here involved and if Section 9(b) of the Federal Power Act is to be given the meaning and effect which the Federal Power Commission and the Court below gave to it, then the state may interpose varied conditions, limited only by inclination, to nullify the licensing provisions of the Federal Power Act.

The true meaning and correct application of Section 9(b) of the Federal Power Act are matters of great public moment which only this Court can finally resolve, and which in the public interest should be resolved beyond question or doubt. Moreover, the decision of the Court below, on several of the basic questions presented, appears to be in conflict with decisions of this Court.

1. Section 23(b) of the Federal Power Act clearly delineates the spheres within which state and federal authorities may rightfully operate in the regulation of proposed power projects on flowing streams within the borders of a state. By that section a federal license is required where the proposed project is upon navigable waters of the United States. Likewise a federal license is required by Section 23(b) before the construction of a power project is undertaken across, along, over or in any stream, not a navigable water of the United States, *whenever the Commission finds that interstate or foreign commerce will be affected by the proposed construction.* When, and only when, the Commission finds that interstate and foreign commerce *will not be affected* by such proposed construction may the project be constructed "upon compliance with State laws."

The Cedar River is a navigable water of the United States. A federal license is required and the Federal Power Commission so found in its order of June 3, 1941. Yet the Federal Power Commission and the Court below find justification for a State permit or license as a prerequisite to the issuance of a federal license. This holding is based on the provisions of Section 9(b) of the Act. The Commission provided no logical *rationale* for its decision.

The Court below interpreted Section 9(b) to mean that Congress provided for (1) *joint* State and federal control over hydro-electric projects upon navigable waters of the United States, (2) a limitation upon federal authority which effectively "saved" certain state laws which otherwise would have been superseded, (3) State regulation within an "area of law" so obvious that Congressional intent to enter that field could not be justified without a much more clear pronouncement, and (4) recognition of an Iowa law which did not stand as an "obstacle" to the accomplishment and execution of the full purposes and objectives of Congress as announced in Part I of the Federal Power Act. The Court also held that Petitioner's failure to seek a State permit under Chapter 363 of the Iowa Code violated the rule of judicial administration which requires that administrative remedies be exhausted before judicial review will lie.

2. Chapter 363 of the Iowa Code is a comprehensive enactment of general application concerning the development and regulation of water power.[7] The chapter must be construed as a whole. Individual sections do not stand alone. *Helvering* v. *New York Trust Co.*, 292 U. S. 455; *Hellmich* v. *Hellman*, 276 U. S. 233; *Helvering* v. *Credit Alliance Corp.*, 316 U. S. 107. Both the Commission and the Court below emphasize various sections of Chapter 363, particu-

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[7] The preamble to the Code Commission Bill (Senate File 186), which, with revisions, became Chapter 363 of the Iowa Code of 1924, and of 1939, provided:

> "The general purpose of this bill is to combine and codify into one body two chapters relating to water power improvement. Both these chapters ante-date hydroelectric development, and neither one is available for projecting and utilizing water power improvements in the modern sense. Recent investigations disclose that thousands of horsepower could be made available for industrial development under proper provisions of law. While the bill prescribes, with some modifications, the ancient mill dam and race statute, the two bodies of law are combined and broadened by the proposals of the bill in an effort to promote and encourage water power development."

larly Sections 7767, 7771 and 7796. But such sections, and other sections of Chapter 363, are only important in laying down the conditions which an applicant for a *state permit* must satisfy. That is a matter of state administration. The individual sections of Chapter 363 do not stand alone. They are each a part of one act. The issuance of a state permit is the only matter of concern to the Federal Power Commission, *if Section 9(b) requires compliance with Chapter 363.*

Joint state and federal control means divided authority. It is difficult to understand what Petitioner would do with separate state and federal licenses for the same project or which one of the two licenses would prevail where contrary rules, regulations and license provisions obtained. On the other hand, it is unreasonable to assume that it was the intention of Congress, the Commission, and the Court below to require a State permit to satisfy to the letter the requirements of Section 9(b) and, having thus satisfied those requirements, to consign the State permit to the limbo of forgotten regulations. However, if a State permit cannot be had, is such failure an insurmountable obstacle to the issuance of a federal license? Petitioner finds itself in an impossible situation. As Mr. Justice McLean said, in writing the Court's decision in *The Passenger Cases*, 7 Howard 283:

> "A concurrent power in two distinct sovereignties to regulate the same thing is as impossible in principle as it is impractical in action. It involves a moral and physical impossibility."

3. If the decision of the Commission and the Court below is permitted to stand the several states and territories may effectively veto the construction of any power project upon navigable waters of the United States by legislating with respect to the construction of such projects and imposing terms and conditions as a prerequisite to construction. The construction of a proposed power project for which a federal license is required under Part I of the Federal Power Act, may thus be vetoed by State action. If Petitioner must

comply with Chapter 363 of the Iowa Code of 1939, the State Executive Council may dictate when and how the proposed project will be built and how it will be operated and maintained, notwithstanding the various provisions of Part I of the Federal Power Act relating to conditions upon which a license may be issued. Section 10 of the Federal Power Act [16 U. S. C. 803] provides that all licenses shall be conditioned upon the right of the Commission, among other things, to modify the plans for the proposed construction, to limit or reject alterations in the project works at variance with approved plans, to provide for fitting maintenance and repair of project works, and to impose other conditions not inconsistent with the provisions of Part I of the Act. Section 11 [16 U. S. C. 804] provides for the inclusion of structures for navigation in any proposed project upon navigable waters of the United States under the circumstances specified. Section 13 [16 U. S. C. 806] provides a time limit for construction. The license provisions of the Act are replete with provisions requiring administration by the Federal Power Commission.

If the State of Iowa under Chapter 363 of the Iowa Code can issue a valid permit which is to govern the construction, operation and maintenance of a power project on the Cedar River, a navigable water of the United States, and which the Federal Power Commission must recognize under Section 9(b), and other states can likewise enter the realm of regulation concerning power projects upon navigable waters of the United States within their borders, prospective development of hydroelectric projects upon navigable waters of the United States must proceed according to the divergent views of the several states as required by state statute and the administration therein provided.

4. When Congress occupies a field within its competence, state regulation is at an end. *Wilson* v. *Blackbird Creek Marsh Co.*, 2 Pet. 245; *Hines* v. *Davidowitz*, 312 U. S. 52; *California* v. *Thompson*, 313 U. S. 109, 114; *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148. The Court below, how-

ever, held that it was not the intent of Congress, in enacting the Federal Power Act, that the Federal governments should occupy the field completely, or that the states should be excluded; that on the contrary, the Act contemplates a dual system of control and the exercise of appropriate powers by the state, as well as by the Federal government.' The Court below then concludes by saying, "This is the plain purpose of Section 9(b). It is revealed, also, by other sections of the Act."[9] (R. 58)

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[8] The Court below cites the following cases in its footnote 9: United States v. Appalachian Electric Power Co., 311 U. S. 377, 428-429; Alabama Power Co. v. Federal Power Commission, 73 U. S. App. 315, 320, 128 F. (2d) 280, 285; Safe Harbor Water Power Corporation v. Federal Power Commission, 3 Cir., 124 F. (2d) 800, 806-807. These cases provide no support for the claim that Congress delegated to the States a part of its authority over navigable waters. Congress in Part I of the Federal Power Act sought to respect the rightful prerogatives of the States. It did no more. The legislative history of Section 9(b) of the Federal Water Power Act of 1920 makes that certain.

In footnote 33, the Court below refers to the *Jersey Central Power & Light Company* v. *Federal Power Commission*, 319 U. S. 61, 76, in support of the statement that the legislative history of the Federal Power Act indicated a purpose on the part of Congress to assist and strengthen State control and regulation rather than impair and diminish it. The *Jersey Central case* dealt with Parts II and III of the Federal Power Act which were enacted in 1935, more than 15 years after the enactment of Section 9(b) which was a part of the Federal Water Power Act of 1920, now Part I of the Federal Power Act. Likewise Parts II and III were involved in *Connecticut Light and Power Co.* v. *Federal Power Commission*, ——— U. S. ———, 65 S. Ct. 749 (Footnote 31 to Opinion below).

Reference to the case of *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U. S. 591, 610 (Footnote 32), by the Court below provides no support for the reasoning of the Court. That case dealt with the Natural Gas Act of 1938, (c. 56, 52 Stat. 821; 15 U. S. C. 717 *et seq.*). Its provisions deal with the same matters of regulation concerning gas as Parts II and III of the Federal Power Act provide for electric power.

[9] The Court below cites the following sections of the Federal Power Act in footnote 10: Section 4(e), 4(f), 7(a), 10(e), 14, 19, 20, 27; 16 U. S. C. A. §§ 797(e), 797(f), 800(a), 803(e), 807, 812, 813, 821. Nowhere in these sections is there the slightest indication that Congress intended or contemplated dual or divided control with respect to any subject matter.

Part I of the Federal Power Act, which is substantially the Federal Water Power Act of 1920 (41 Stat. 1063), is not to be confused with Parts II and III of the Federal Power Act which were enacted as Title II of the Public Utility Act of 1935 (49 Stat. 838). The purpose of Congress in enacting the Federal Water Power Act of 1920 was to unify control over hydroelectric power developments on navigable waters of the United States under a dominant federal authority.[10] Although cited by the Court below, we do not find in the Court's decision in *United States* v. *Appalachian Electric Power Company*, 311 U. S. 377, 428-429, support for the statement that Congress in enacting Part I of the Federal Power Act contemplates a dual system of control within the usual meaning of that term, by the state as well as the Federal government over power projects upon navigable waters of the United States. Each has certain legitimate functions in its own sphere. But certainly it could never have been intended by Congress that a state and federal license should issue with respect to a power project upon a navigable water of the United States, and that both licenses were to have simultaneous valid application, with separate administration, and each provide for the construction, operation and maintenance of the same power project. Such must be the result if Section 9(b) gives life to Chapter 363 of the Iowa Code. Thus the ultimate in dual control would be attained. We think that the decision of this Court in the *Appalachian* case cannot be so interpreted. Dealing with the question of structures in navigable waters of the United States, the Court, at page 424, said:

> "Possessing this plenary power to exclude structures from navigable waters and domination over flowage and its product, energy, the United States may make the erection or maintenance of a structure in a navigable water dependent on a license. This power is exercised through section 9 of the Rivers and Harbors Act of 1899 prohibiting construction without Congressional consent and through section 4(e) of the present Power Act."

[10] See legislative history, Appendix, pp. 34-51, 52-60.

We think that Part I of the Federal Power Act cannot be rightly interpreted as providing any opportunity for the exercise of State regulatory powers over a hydroelectric project upon navigable waters of the United States. True, the states have jurisdiction in so far as property rights are concerned. It is equally true that Part I of the Act rightfully provides for cooperation with the states in many respects. But nowhere is there any indication that Congress intended to surrender, for state regulation and control, any part of the time honored and zealously guarded jurisdiction and authority of the federal government over commerce and navigable waters of the United States. The legislative history of Section 9(b)[11] does not justify the conclusion of the Court below that the section "saves" certain state laws as effectively as Section 27 saves other state laws. The vital question is whether Section 9(b) "saves" Chapter 363 of the Iowa Code. If it does, then Petitioner finds itself in the position of being required to secure a state permit and a federal license. Petitioner will then be in the unenviable position of not knowing how to satisfy two masters.

5. A permit from the State of Iowa either is or is not required to satisfy the provisions of Section 9(b) of the Federal Power Act. The Court below held that Petitioner, in order to satisfy the requirements of Section 9(b), must obtain a permit from the State Executive Council as provided by Chapter 363 of the Iowa Code. In concluding its opinion, the Court said:

> "The Commission, properly, insisted upon a good faith effort, by its applicant, to comply with the state law." (R. 72)

It is to be noted that the Court did not there say that a permit was required. The Court implies that the Commission must be satisfied with a "good faith effort * * * to comply with the state law."

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[11] Appendix, pp. 34-51, 52-60.

At another point in its opinion the Court makes this statement:

> "In recognizing and safeguarding the concurrent interest of the states in hydroelectric developments, it was not the purpose of Congress to require their consent to the construction and operation of such projects, or to give, to the states, a veto power over them." (R. 66)

The Court below seems to say, therefore, that a state permit is required to comply with Section 9(b) if such a permit can be had; that in any event Petitioner is required to make a *good faith effort* to obtain a permit from the Executive Council of the State of Iowa as required by Chapter 363 of the Iowa Code; and that if Petitioner fails, notwithstanding its *good faith effort* to obtain the required state permit, then Petitioner may be excused from compliance with the state law if it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Petitioner respectfully submits that Section 9(b) of the Federal Power Act cannot be construed as it has been construed by the Federal Power Commission and the Court below. The legislative history clearly indicates that in the enactment of its provisions, Congress only sought to preserve to the states those matters rightfully within the jurisdiction of the state. In the legislative history of Section 9(b), there is but one reference to a court case and that was by Congressman La Follette (56 Cong. Rec. 9810-11) who cited a decision handed down by Mr. Justice Pitney on May 12, 1917. Obviously reference was to the case of *United States* v. *Cress*, 243 U.S. 316, 319, decided on March 12, 1917. Nowhere in Part 1 of the Federal Power Act or the legislative history leading up to its passage, is there any indication that Congress intended to surrender any part of its rightful jurisdiction, power and authority over navigable waters of the United States. Yet, if it is concluded that Section 9(b) requires a state permit as a pre-

requisite to the issuance of a federal license, then Congress has surrendered a most vital part of its authority over the construction of power projects upon navigable waters of the United States and has conferred upon each of the several states broad veto powers which will enable each and every state by appropriate state legislation to determine when and under what conditions it will permit the Federal Power Commission to issue a federal license under Part I of the Federal Power Act for the construction, operation and maintenance of a power project upon navigable waters of the United States or upon any waters within the confines of a state for which a federal license is required by the provisions of Section 23(b) of the Federal Power Act.

Petitioner is impaled on the horns of a dilemma. If Petitioner obtains a state license, and, as a consequence, a federal license, it can not honestly undertake to comply with the obligations imposed by the state permit and the federal license, dealing as they do with the same subject matter and seeking simultaneously to regulate and govern construction, maintenance and operation of the project. On the other hand, even though Petitioner cannot obtain a permit from the State, it is required, according to the court below, to exhaust its administrative remedies. According to the opinion of the Attorney General of the State of Iowa, effort by Petitioner to obtain a state permit will be of no avail since the Executive Council of the State of Iowa cannot lawfully issue a state permit to Petitioner for the project in question. (R. 49) The requirement by the Court below that Petitioner make a *good faith effort* to obtain a state permit, therefore, directs Petitioner to pursue a futile course. Your Petitioner cannot believe that Congress intended that an applicant for a license under Part I of the Federal Power Act was to be thus subjected to such impossible requirements and procedures.

6. This Court in *United States* v. *West Virginia*,[12] 295 U. S. 472, held that the mere grant of a state license does not involve any infringement of the federal authority. In this case, the State of Iowa insists that it cannot under its laws grant a permit to Petitioner. The question presented, therefore, is whether a state law prohibiting the issuance of a state permit for a project for which a federal license is required, and which would be issued but for such a state law, does involve an infringement of the federal authority. The public interest and orderly administration of Part 1 of the Federal Power Act[13] requires that the issues presented be resolved by this Court.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be granted.

GEORGE B. PORTER

ANDREW G. HALEY
Counsel for First Iowa Hydro-Electric Cooperative, Petitioner.

RALPH U. THOMPSON,
Muscatine, Iowa

JOHN CONNOLLY, JR.
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Of Counsel for Petitioner

November, 1945.

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[12] Although this case was discussed fully in Petitioner's reply brief filed with the Court below, the Court did not mention the case in its decision.

[13] The Federal Power Commission in its Opinion No. 110 (R. 14-17) evidences confusion as to the application and meaning of Section 9(b).

APPENDIX.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Commissioners

Claude L. Draper, Acting Chairman, John W. Scott and Clyde L. Seavey. Basil Manly and Leland Olds not participating.

June 3, 1941

Docket No. DI-154.

IN THE MATTER OF
FIRST IOWA HYDRO-ELECTRIC CO-OPERATIVE.

FINDING OF COMMISSION.

Upon declaration of intention filed January 29, 1940, pursuant to Section 23(b) of the Federal Power Act, by First Iowa Hydro-Electric Co-operative of Muscatine, Iowa, to construct a project on Cedar River, a tributary of the Iowa River, in Muscatine and Cedar Counties, Iowa; and

Upon supplemental declaration of Intention filed April 2, 1941, by the same cooperative to construct a different scheme of development at approximately the same site; and

It appearing to the Commission, after investigation of the proposed construction, consideration of the declaration of intention and supplement thereto, and all pertinent records, that:

(A) The declarant is a corporation organized and operating under the laws of the State of Iowa;

(B) The project as proposed both in the declaration of intention and supplement thereto will be located on the Cedar River near Moscow, Iowa, about 21 miles above its junction with the Iowa River, which latter stream flows into the Mississippi River at a point about 28 miles below the mouth of the Cedar River;

(C) Both the Cedar and Iowa Rivers at one time carried a portion of the produce and immigration of Central Iowa, and steamboats made many trips with more or less regularity in this trade;

(D) Past actual use of the Cedar and Iowa Rivers for navigation over a period of years and in substantial volume establishes the susceptibility of these Rivers to navigation, notwithstanding present non-use;

(E) The project as proposed in the original declaration of intention was to consist of a dam on the Cedar River not more than 53 feet high, having an over-all length of about 8,588 feet, composed of a non-overflow concrete gravity section, a concrete spillway section controlled by 16 Taintor gates, and an earth section; a power house integral with the dam, with proposed installation of three 5,000-kw. generating units; and a reservoir having a useful storage capacity of 72,000 acre-feet;

(F) The effect of operation of the project, as proposed in the original declaration of intention, would be to reduce the stage of the Iowa River at Wapello, a point about 34 miles below the project, by as much as 1.3 feet; and to reduce the stage of the Mississippi River at the mouth of the Iowa by 0.5 feet;

(G) The project as proposed in the declaration of intention as supplemented, will consist of the dam on the Cedar River; a diversion canal about 8 miles long from the reservoir on the Cedar River which will divert the water to the banks of the Mississippi River at Muscatine, Iowa; and instead of the power plant being constructed at the dam, it will be constructed on the west bank of the Mississippi River at Muscatine, and will have an initial installation of 50,000 kilowatts, with an ultimate installation of 100,000 kilowatts;

(H) The effect of operation of the project, as described in the declaration of intention as supplemented, on the flow of the Cedar and Iowa Rivers would be substantially the same as that which the original project would have caused, except that it would be more continuous and frequent;

(I) Apparently the diversion canal will be sufficient size to divert the entire flow of the Cedar River over long periods of low and moderate flow; and such diversion could lower the stage of the Iowa River by about 1.6 feet at Wapello, Iowa;

(J) The operation of the modified project would cause a discharge of additional water through the diversion canal into the Mississippi River at Muscatine in the amount of from 9,300 c.f.s. to 15,500 c.f.s. for short periods; which compares with the minimum flow in the Mississippi at Muscatine, estimated as approximately 7,300 c.f.s.;

(K) Declarant has stated that the modified project could be so operated as to give a sustained flow for six continuous days and then completely shut down for a 24-hour period over Sunday of each week, during which shut-down period a steam standby plant situated about 1½ miles from the hydro plant will be operated;

(L) According to the records of the General Land Office, two small islands situated in the Cedar River about 5½ miles and 6½ miles, respectively, above the proposed dam site and within the storage lake area of the proposed project (Lot 4, Sec. 6, and Lot 7, Sec. 8, T. 78 N., R. 2 W., 5th Principal meridian, Iowa) are vacant public lands, and are included in Power Site Classification No. 321, dated December 5, 1940;

The Commission *finds* that:

(1) The Cedar and Iowa Rivers are navigable waters of the United States;

(2) The diversion of water from the Cedar River by means of the diversion canal as set forth above would have a direct and substantial effect upon the flow and stage of the Iowa River and hence would affect the navigable capacity of that river;

(3) The alternate withholding of water in the reservoir and canal during periods of shut-down of the power plant and the release of water at substantial rates of flow during periods of operation of the power plant, as set forth above, would cause extreme fluctuations in the flow of the Mississippi River at Muscatine, Iowa, and would substantially affect the navigable capacity of that river;

(4) The interests of interstate commerce would be affected by construction of the project as described in the declaration of intention as supplemented;

(5) The two small islands described in paragraph (L) above are public lands of the United States and will be partly or wholly flooded by the reservoir of the proposed project and will be occupied by the project;

(6) A license for the construction proposed above is required under the provisions of the Federal Power Act.

By the Commission.

LEON M. FUQUAY,
Secretary.

PERTINENT SECTIONS OF THE FEDERAL POWER ACT.

SEC. 4. [*As amended August 26, 1935.*] The Commission is hereby authorized and empowered—

* * * * * * * * * * *

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation: *Provided further*, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting navigation have been approved by the Chief of Engineers and the Secretary of War. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: *Provided further*, That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall

have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920; *And provided further*, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection.

* * * * * * * * * * *

SEC. 9. That each applicant for a license hereunder shall submit to the commission—

(a) Such maps, plans, specifications, and estimates of cost as may be required for a full understanding of the proposed project. Such maps, plans, and specifications when approved by the commission shall be made a part of the license; and thereafter no change shall be made in said maps, plans, or specifications until such changes shall have been approved and made a part of such license by the commission.

(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act.

(c) Such additional information as the commission may require.

* * * * * * * * * * *

SEC. 23 (b) It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof,

other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws.

* * * * * * * * * *

SEC. 27. That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

CHAPTER 363, IOWA CODE, 1939

Mill Dams and Races.

7767 PROHIBITION—permit. No dam shall be constructed, maintained, or operated in this state in any navigable or meandered stream for any purpose, or in any other stream for manufacturing or power purposes, nor shall any water be taken from such streams for industrial purposes, unless a permit has been granted by the executive council to the person, firm, corporation, or municipality constructing, maintaining, or operating the same. (R60, §1264; C73, §1188; C97, §1921; C24, 27, 31, 35, §7767.)

7768 APPLICATION FOR PERMIT. Any person, firm, corporation, or municipality making application for a permit to construct, maintain, or operate a dam in any of the waters, including canals, raceways, and other constructions necessary or useful in connection with the development and utilization of the water or water power, shall file with the executive council a written application, which shall contain the following information:

1. The name of the navigable, meandered, or other stream in or across which a dam is maintained or it is proposed to construct a dam or other obstruction, and a description of the site for such dam, including the name or names of the riparian owners of the site.

2. The purpose for which the dam is maintained or for which it is proposed to maintain the same, including the use to which the water is to be put.

3. A general description of the dam, raceways, canals, and other constructions, including the specifications as to the material and plan of construction and a general description of all booms, piers, and other protection works which are constructed in connection therewith, or which it is proposed to erect in connection therewith.

4. The approximate amount of hydraulic power that the dam is capable of developing and the amount of power to be used.

5. A map or blue print on a scale of not less than four inches to the mile, showing the lands that are or may be affected by the construction, operation, or maintenance of the dam, and the ownership of each tract of land within the affected area.

6. Such additional information as may be required by the executive council (R60, §1265; C73, §§188, 1189; C97, §1921; C24, 27, 31, 35, §7768).

7769 Notice of Hearing. When any application for a permit to construct, maintain, or operate a dam from and after the passage of this chapter is received, the executive council shall fix a time for hearing, and it shall give notice of the time and place of such hearing by publication once each week for two successive weeks in at least one newspaper in each county in which riparian lands will be affected by the dam (R60, §§1266, 1270; C73, §1190; C97, §1922; C24, 27, 31, 35, §7769).

7770 Hearing. At the time fixed or such hearing or at any adjournment thereof, the council shall take evidence offered by the applicant and any other person, either in support of or in opposition to the proposed construction. (R60, §§1267, 1268; C73, §§1192, 1193; C97, §§1924, 1925; C24, 27, 31, 35, §7770.)

7771 When Permit Granted. If it shall appear to the council that the construction, operation, or maintenance of the dam will not materially obstruct existing navigation, or materially affect other public rights, will not endanger life or public health, and any water taken from the stream in connection with the project is returned thereto at the nearest practicable place without being materially diminished in quantity or polluted or rendered deleterious to fish life, it shall grant the permit, upon such terms and conditions as it may prescribe. (R60, §1269; C73, §§1193, 1198; C97, §1930; C24, 27, 31, 35, §7771.)

7772 Certificate of Approval. No permit shall be granted for the construction or operation of a dam where the water is to be used for manufacturing purposes, except to develop power, until a certificate of the state department of health has been filed with the council showing its approval of the use of the water for the purposes specified in the application. (C24, 27, 31, 35, §7772.)

7773 Application For Certificate. When it is proposed to use the water for maunfacturing purposes, except to develop power, or for condensation purposes, application must be made to the department of health, accompanied by a description of the proposed use of the water and what, if

any, substances are to be deposited in such water and chemical changes made in the same, and such other information as the department of health may require to enable it to determine the advisability of the issuance of such certificate. (C24, 27, 31, 35, §7773.)

7774 GRANTING OR REFUSING. If the department of health is satisfied that the use of the water in any such project will not cause pollution of the same or render it materially unwholesome or impure, or deleterious to fish life, it may issue a certificate, and if it is not so satisfied, it shall refuse to issue same. (C24, 27, 31, 35, §7774.)

7775 PERMIT FEE—annual license. Every person, firm, or corporation, excepting a municipality, to whom a permit is granted to construct or to maintain and operate a dam already constructed in or across any stream for the purpose herein specified, shall pay to the executive council a permit fee of one hundred dollars and shall pay an annual inspection and license fee, to be fixed by the executive council, on or before the first day of January, 1925, and annually thereafter, but in no case shall the annual inspection and license fee be less than twenty-five dollars. All fees shall be paid into the general fund of the state treasury.

The provisions of this section shall not apply to dams already constructed having less than twenty-five horsepower capacity. (C24, 27, 31, 35, §7775.)

7776 CONSTRUCTION AND OPERATION. The executive council shall investigate methods of construction, reconstruction, operation, maintenance, and equipment of dams, so as to determine the best methods to conserve and protect as far as possible all public and riparian rights in the waters of the state and so as to protect the life, health, and property of the general public; and the method of construction, operation, maintenance, and equipment of any and all dams in such waters shall be subject to the approval of the executive council. (C24, 27, 31, 35, §7776.)

7777 ACCESS TO WORKS. Such council or any member, agent, or employee thereof shall at all times be accorded full access to all parts of any dam and its appurtenances being constructed, operated, or maintained in such waters. (C24, 27, 31, 35, §7777.)

7778 DUTY TO ENFORCE STATUTES. It shall be the duty of the council to require that all existing statutes of the

state, including the provisions of this chapter, with reference to the construction of dams, shall be enforced. (C'24, 27, 31, 35, §7778.)

7779 Violations. The construction, maintenance, or operation of a dam for the purpose specified herein without a permit first being issued, as in this chapter provided, shall constitute a misdemeanor, and shall be punishable by a fine of not less than one hundred dollars nor more than five hundred dollars. (C'24, 27, 31, 35, §7779.)

7780 Action to Collect Fees. If any dam is constructed, operated, or maintained without the provisions of this chapter having been first complied with, including the payment of the permit fee and the annual inspection and license fee, the permit fee and the inspection and license fee may be recovered in an action brought in the name of the state, and in addition to the recovery of the amount due, there shall be collected a penalty of one thousand dollars. (C'24, 27, 31, 35, §7780.)

7781 Unlawful Combination—Receivership. If any dam for which a permit has been issued becomes owned, leased, trusteed, possessed, or controlled in such manner as to be controlled by any unlawful combination or trust, or forms the subject or part of the subject of any contract or agreement to limit the output of any hydraulic or hydroelectric power derived therefrom for the purpose of price fixing as to such output, the state may take possession thereof by receivership proceedings instituted by the council, and such proceedings shall be conducted for the purpose of disposing of said property for lawful use and the proceeds shall be turned over to the persons found by the court to be entitled thereto, after the payment of all expenses of the receivership. (C'24, 27, 31, 35, §7781.)

7782 Nuisance. If any dam is constructd, maintained or operated for any of the purposes specified herein, in waters of this state in violation of any of the provisions of this chapter or in violation of any provisions of the law, the state may, in addition to the remedies herein prescribed, have such dam abated as a nuisance. (C'24, 27, 31, 35, §7782.)

7783 Condemnation—Petition. Any person, firm, corporation, or municipality owning land on one or both sides of a watercourse, desiring to construct or heighten any dam

in such watercourse or to construct or enlarge a raceway, canal, or other construction necessary for the development or utilization of the water or water power for any of the purposes specified in this chapter therefrom for the purpose of propelling any mill or machinery or developing any power by the use of the water, and to whom a permit has been granted as in this chapter provided, may file in the office of the clerk of the district court of the county in which such dam is, or is to be erected or heightened, a petition designating himself as plaintiff and the owners of the land affected, or that will be affected, as defendants, and describing with reasonable certainty the locality where such dam is to be erected or improved, and also of the lands that will be overflowed or otherwise affected thereby. (R60, §§1264, 1265, 1274; C73, §§1188, 1189; C97, §1921; C24, 27, 31, 35, §7783.)

7784 PRECEPT FOR JURY—SERVICE. The clerk shall thereupon issue an order, with a copy of the petition attached, directed to the sheriff, commanding him to summon a jury of twelve disinterested electors of his county to meet on a day fixed therein, and upon the land described, which order, including the copy of the petition, shall be served on the defendants in the same manner and for the same length of time previous to the day fixed in the order as is required for the service of original notices. Where the owner of any land affected is a nonresident of the state, service shall be made of the notice by publication in a newspaper in the county once each week for three successive weeks. (R60, §1266; C73, §1190; C97, §1922; C24, 27, 31, 35, §7784.)

7785 GUARDIAN APPOINTED. When service is made upon a minor or insane person having no guardian, the clerk at the time of issuing the order shall, by indorsement made thereon, appoint a suitable person to make defense for him. (C73, §1190; C97, §1922; C24, 27, 31, 35, §7785.)

7786 LANDS IN DIFFERENT COUNTIES. If any of the lands are situated in a different county than that in which the petition is required to be filed, the proceedings shall apply thereto to the same extent as if such lands were situated in the county where it is filed. (R60, §1270; C73, §1191, C97, §1923; C24, 27, 31, 35, §7786.)

7787 OATH—ASSESSMENT OF DAMAGES—COSTS. The jury shall be sworn, impartially and to the best of their skill and

judgment, to view the lands described in the petition, and ascertain and appraise the damages each of the defendants will sustain by reason of such lands being overflowed or otherwise injuriously affected by the dam or raceway or heightening or enlarging the same. They may, in addition to examining the premises, examine witnesses, and shall determine the amount of damages to which each of the defendants are, in their judgment, entitled, by reason of the construction or improvement of the dam or raceway, and shall report their findings in writing, attaching the same to the order and returning it to the sheriff. All costs and fees in connection with the assessment of damages under this chapter shall be the same as in condemnation cases and shall be paid by the plaintiff. (R60, §§1267, 1273; C73, §§1192, 1193, 1203; C97, §§1924, 1925, 1935; C24, 27, 31, 35, §7787.)

7788 APPEAL. Either party may appeal from such assessment to the district court within thirty days after the assessment is made and such appeal and all further proceedings in connection with such matter, whether as to an appeal or the payment of damages and costs, and all other matters connected with the proceedings, shall be the same as provided by law for assessment of damages in taking property for works of internal improvement. (C73, §1194; C97, §1926; C24, 27, 31, 35, §7788.)

7789 PROTECTION OF BANKS. Where the water backed up by any dam belonging to any mill or machinery is about to break through or over the banks of the stream or raceway, or to wash a channel, so as to turn the water of such stream or raceway, or any part thereof, out of its ordinary channel, whereby such mill or machinery will be materially injured or affected, the owner or occupant of such mill or machinery, if he does not own such banks or the land lying contiguous thereto, may, if necessary, enter thereon and erect and keep in repair such embankments and other works as may be necessary to prevent such water from breaking through or over the banks, or washing a channel as aforesaid; such owner or occupier committing thereon no unnecessary waste or damage, and being liable to pay all damages which the owner of the lands may actually sustain by reason thereof. (R60, §§1275, 1276; C73, §1204; C97, §1936; C24, 27, 31, 35, §7789.)

7790 EMBANKMENTS—DAMAGES. If any person shall injure, destroy, or remove any such embankment or other works, the owner or occupier of such mill or machinery may recover of such person all damages he may sustain by reason thereof. (R60, §1277; C73, §1205; C97, §1937; C24, 27, 31, 35, §7790.)

7791 RIGHT TO UTILIZE FALL. Any person owning and using a water power for the purpose of propelling machinery shall have the right to acquire, maintain, and utilize the fall below such power for the purpose of improving the same, in like manner and to the same extent as provided in this chapter for the erection or heightening of mill dams. After such right has been acquired, the fall shall be considered part and parcel of said water power or privilege, and the deepening or excavating of the stream, tail, or raceway, as herein contemplated, shall in no way affect any rights relating to such water power acquired by the owner thereof prior to such change. (C73, §1206; C97, §1938; C24, 27, 31, 35, §7791.)

7792 REVOCATION OR FORFEITURE OF PERMIT. If the person to whom a permit is issued under the provisions of this chapter does not begin the construction or the improvement of the dam or raceway within one year from the date of the granting of the permit, his permit may be revoked by the executive council, and if any permit holder does not finish and have in operation the plant for which the dam is constructed within three years after the granting of the permit, unless for good cause shown the council has extended the time for completion, such permit shall be forfeited. (R60, §1269; C73, §1199; C97, §1931; C24, 27, 31, 35, §7792.)

7793 LEGISLATIVE CONTROL. No permit granted or rights acquired hereunder shall be perpetual, but they shall be subject to restriction, cancellation, and regulation by legislative action, and subject to all the provisions of this chapter. (C24, 27, 31, 35, §7793.)

7794 PENDING APPLICATIONS. All applications for a permit to construct a dam pending in the district courts of this state at the time of the passage of this chapter shall be heard and determined by the district court of the county in which same is pending under the laws of Iowa at the time of the making of the application to the district court, and

where a permit has, prior to the passage of this chapter, been granted by the district court of any county, the applicant shall, in addition to the making of the application in the form provided in section 7768, file a transcript of the proceedings of the district court granting the said permit with said application, and thereupon a permit shall be issued to the applicant without further proceedings, upon payment of the required fees. (C24, 27, 31, 35, §7794.)

7795 PERMITS FOR EXISTING DAMS. The owner of a dam existing at the time of the taking effect of this chapter shall make application for a permit, which application shall be accompanied by such proofs and data as may be required by the executive council. Upon receipt of such application with proofs and data and payment of fees as required, the executive council shall grant a permit for the maintenance and operation of said dam as a matter of course. The owner of such dam shall, however, be subject to all of the regulatory provisions of this chapter. (C24, 27, 31, 35, §7795.

7796 STATE LANDS. Whenever the erection of any such dam will affect highways or state-owned lands, the applicant shall as a condition precedent secure a permit from the board, commission, or other official body charged with jurisdiction over and control of said highways or state-owned lands. (C24, 27, 31, 35, §7796.)

7796.1 CITIES AND TOWNS. Cities and towns shall have the authority and power, by complying with the provisions of this chapter and the statutes relating to municipalities to construct dams for recreational purposes and to acquire lands that may be necessary in the construction thereof, which may be obtained by condemnation or otherwise. (C27, 31, 35, §7796-b1.)

EXCERPTS FROM MASTER'S THESIS OF ROY BAKER SNAPP SUBMITTED TO GEORGETOWN UNIVERSITY.

b. *Water Power Legislation 1917-1920*

In 1917 a bill, S. 1419, providing comprehensive legislation for the development of water power on the *navigable streams* of the United States was introduced in the Senate. This bill was the genesis of the Federal Water Power Act. The only provision in S. 1419 similar to Section 9 (b) of the Federal Water Power Act was one which provided:

> "* * * before the permit shall be granted under this act, the permittee must first obtain, in such manner as may be required by the laws of the States, the consent of the State or States in which the dam or other structure for the development of water power is proposed to be constructed."

The above provision, calling for "consent" of a State to erect a project, is a marked contrast to the ultimate wording of Section 9 (b). S. 1419 was passed by the Senate and was referred in the House to the Committee on Interstate and Foreign Commerce which had jurisdiction over navigable streams. Before the House committee could act on the proposed measure, however, President Wilson's intervention resulted in the House striking out everything but the enacting clause of S. 1419 and substituting an entirely new bill.

According to Representative Sims,[17] President Wilson early in 1918 requested the members of the House Committees on Public Lands, Agriculture, Interstate and Foreign Commerce, and Rules to confer with him at the White House. At that meeting the President stated that he had requested the Secretary of War whose department had jurisdiction over navigable rivers, the Secretary of the Interior whose department had jurisdiction over public lands, and the Secretary of Agriculture whose department had jurisdiction over forest preserves, to prepare a *single bill*[18] *which would be comprehensive enough to cover water*

[17] Cong. Rec., 65th Cong., 2nd Sess., pp. 9797-99.

[18] Introduced as H. R. 8716, 65th Cong., 2nd Sess.

power on all sites over which the federal government had jurisdiction. After summarizing the fundamental principles of the bill, the President asked the members of the committees present if they would object to having a "special committee created composed of an equal number of members of those legislative committees to consider the bill * * * and he asked the Committee on Rules * * * to advise whether or not a rule could be secured or could be formulated that would accomplish this purpose." In reply, Representative Sims indicated that his committee might be reluctant to amalgamate its power over navigable rivers with other committees and Mr. Pou of the Rules Committee said that such a committee could be established, but that the House might be reluctant to do so because such a proposition was new and might be considered as establishing a precedent.

The request of the president, was acceded to by the House, however, and on January 16, 1918 a "Special Committee on Water Power" was appointed.[19] The committee held hearings on the proposed legislation from March 18 to May 15, 1918, obtaining testimony and exhibits totaling almost 900 pages.—[20]

In theory the Special Committee on Water Power conducted hearings on S. 1419. In reality hearings were held on President Wilson's proposed substitute for that bill—H. R. 8716. The proposed substitute contained a Section 9 (b) which provided that an applicant for a license should submit to the proposed commission:

> "Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be

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[19] Thetus W. Sims, Tenn., Chr.
Scott Ferris, Okla.
Asbury F. Lever, S. C.
Frank E. Doremus, Mich.
Edward T. Taylor, Colo.
Gordon Lee, Ga.
Dan V. Stephens, Nebr.
John E. Raker, Calif.
Ezekiel S. Candler, Miss.
Carl Hayden, Ariz.
John J. Esch, Wis.
Irvine L. Lenroot, Wis.
Gilbert N. Haugen, Iowa
Edward L. Hamilton, Mich.
Wm. L. LaFollette, Wash.
James C. McLaughlin, Mich.
Richard Wayne Parker, N. J.
Sidney Anderson, Minn.

[20] Hearings Before the Committee on Water-Power, House of Rep., 65th Congress, 2nd Sess., 1918.

> located with respect to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power and in any ohter business necessary to effect the purposes of a license under this Act."

With the exception of one slight modification regarding the bed and banks of streams inserted by Representative LaFollette, this Section was ultimately to become also Section 9 (b) of the Federal Water Power Act.

The first witness called before the special committee was Mr. Merill[21] of the Department of Agriculture who, as the Chairman indicated, "assisted in the preparation of the bill."[22] After an introductory statement emphasizing the national necessity of water power legislation,[23] Mr. Merill read and explained each section of the proposed substitute for S. 1419. His statement regarding Section 9 (b) of the substitute bill was:

> "Section 9 of the bill * * * provides that (an applicant) shall present satisfactory evidence of compliance with the requirements of the laws of the State or States within which the proposed project is to be located, showing that the applicant has made application for such rights as the State required him to get before he can do business. That would cover applications for water rights, for example."[24]

Not a member of the Committee questioned Mr. Merill about the meaning of this section.

The first real illumination shed on Section 9 (b) during the testimony before the House Committee was when a Mr. Houghton of New York proposed the section should read as follows:

> "Satisfactory evidence that the applicant has obtained the consent of the duly constituted authorities

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[21] Subsequently, the first Executive Secretary of the Federal Power Commission.

[22] Hearings Before the Committee on Water Power, House of Rep., 65th Cong. 2d Sess. 1918, p. 8.

[23] *Ibid.*, p. 20.

[24] *Ibid.*, p. 62.

of the State or States within which the proposed project is to be located and has complied with the requirements of such State or States with respect to application for the right to appropriate, divert, and use water for power purposes, and for the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purpose of a license under this act."[25]

In the subsequent conversation between Representative Raker (one of the more zealous advocates of irrigation rights in the House) and Mr. Houghton, Representative Raker summarizes so succinctly the general attitude expressed by members of the Special Committee throughout the hearing and during the debate in the House, that the discourse is quoted at length.[26]

"Mr. RAKER. Referring to your suggested amendments * * * they would practically change the real fundamental principles of this bill, would they not?

"Mr. HOUGHTON. I think not. What I was trying to have inserted here was this, that before a person applies he has to show the Federal Power Commission that he has complied with the laws of the State and has received proper authority from the proper officials, and in that sense it has changed the bill, because you say that each applicant shall submit, and I say that before he makes application he shall have obtained the consent of the duly constituted authorities of the State or States.

"Mr. RAKER. Fundamentally, it resolves itself into this, that the States might pass laws subsequent to the enactment of this legislation, and if this bill provided or required that the applicants should comply with the State laws, or rules and regulations provided thereunder before he could operate under this bill, the whole scheme would be subject to the regulation and control, in effect, of the State, would it not?

"Mr. HOUGHTON. I think after he got his power he would be subject, because it provides in here—

[25] *Ibid.*, p. 364.

[26] *Ibid.*, pp. 368-370.

"Mr. RAKER (interposing). But you make this a fundamental prerequisite, that he must have complied with all the rules and regulations in regard to doing the same thing, formulated by the State authorities, before he can even come to the Federal commission and become an operator or a licensee under the provisions of this bill.

"Mr. HOUGHTON. I do not think it is quite that, Mr. Raker, because you provide here in Section 9 that each applicant shall submit to the commission certain things. It virtually follows that until he does do that the Federal Power Commission will not issue him a permit. I want to make sure that the permit will not be issued until he has complied with the requirements in the various States as they may exist at the time he makes his application.

"Mr. RAKER. That really gets back to the fact that before he can proceed to obtain the benefits of this bill, which relates to the property of the Government, he must have complied with any and all laws, rules, and regulations provided by the State through its commission and other public functionaries, and therefore before the Government of the United States can grant him a license or a commission representing the Government of the United States, he must deal with another party first.

"Mr. HOUGHTON. You said public property of the Federal Government. I have confined my remarks entirely to New York State. There are no public lands in New York State, and the only right the Federal Government has, if any, is under the commerce clause as to navigation.

"Mr. RAKER. That is quite considerable under this bill.

"Mr. HOUGHTON. It certainly is, and under the decisions it is very broad. What Congress considers as necessary for navigation is final; there is no review. Here you are seeking in the State of New York to take what the Federal Constitution grants to the citizens of New York; that is, the right to possess their own property for their purposes. It should not be taken from them without just compensation. But here you provide that anybody can go in if the Federal Govern-

ment thinks it is necessary to regulate or improve navigation and take what belongs to the people of the State. The provisions of this bill might very properly apply to developments in those States where the Federal Government has a large amount of public lands, where a great many of the navigable streams are on the public lands.

"Mr. RAKER. Then, would you not by such legislation be authorizing the Government, whenever these rights in the navigable streams give water power to the States, and allow it to legislate on that subject—would you not really make its legislation subordinate to what the State might determine, not only upon navigable streams but particularly on the nonnavigable streams and on public lands.

"Mr. HOUGHTON. It might work out that way possibly, but it seems to me there should be some protection to the State and its interest because you say navigable and nonnavigable streams. There is no telling when navigable streams will be affected by storage impounding of water on nonnavigable streams, and Congress has absolute power to regulate that.

"Mr. RAKER. That is what I am trying to get at. Congress having that power, should it waive it and make it possible by legislation that before any of this can be done, or before the licensee can get his license or the commission have the power to issue it, he must have complied with any and all regulations provided by the State?

"Mr. HOUGHTON. My suggestions were made with the view of possibly avoiding friction between the two Governments.

"Mr. RAKER. Had we not better hold to what we have and not try to waive a fundamental right that is so necessary both on the public lands on the non-navigable streams as well as on the navigable streams?

"Mr. HOUGHTON. I do not agree with you that this suggested amendment waives anything which the bill seems to give to the Federal commission. It simply changes the order of things and it does not add any additional requirements. You say the applicant has to give satisfactory evidence that he has complied with the requirements. I simply say that before he can get the permit he shall show that, so that there will be no

question about it. He might get a license and say he had made application to the State government and say he is going to meet their requirements, but he may never go through with it. This is to protect the State. I am trying to save the State.

"Mr. RAKER. You might find this case: A party or association might have complied with all the provisions of the law save the one you referred to in your amendment. The commission would be justified in their view to give him a license, but he cannot comply with the State requirements, and therefore because he is unable to comply with the State regulations, of necessity the commission cannot give him the license, and therefore you would, by your amendment, subordinate the Federal Government right to the right of the State, and the State would practically control because of a condition of that kind.

"Mr. HOUGHTON. It says you shall submit satisfactory evidence. That is mandatory. From that point of view, how are you subordinating the powers of the Federal Government, with the bill worded as I have suggested wording it, considering how it is not worded? You say he shall submit satisfactory evidence. That means he has to comply with that condition before he submits his application. I do not see the difference. I am making it stronger to see that he has complied with State laws."

The conversation terminated abruptly here when Representative Esch interposed a question.

It is evident from the foregoing that in the opinion of Representative Raker compliance with Section 9 (b) was declaratory as to policy, not a condition precedent to the issuance of a license by the proposed power commission. Obviously, Mr. Raker did not believe that the licensing power, provided for by the act, the very heart of the bill, was to be subject to the laws of the forty-eight states.

It is interesting to note, however, that instead of *satisfactory evidence* that the applicant has complied with the laws of the State or States in which the project is to be located, Mr. Houghton proposed that the applicant secure the *consent* of the duly constituted authorities of the State." S. 1419 as it passed the Senate required that "the permittee

"must first obtain * * * the *consent* of the State or States * * *" (italics supplied). In other words Mr. Houghton was asking the House Committee to return to the wording of the section as it passed the Senate. Not only did the House Committee refuse to do so, but the Senate acceded to the new wording of the Section.

Another witness, Representative Mondell testifying befor the committee and in behalf of national water power legislation said:

> "This act should contain—and I suppose there will be no opposition to that on the part of anyone, as a somewhat similar provision was contained in the Ferris House bill; as exactly the same provision is in the reclamation law, and as the principle has been generally accepted and approved—some such provision as this: 'That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State relating to the control, appropriation, use, or distribution of water.' That is the language, if I recall it rightly, of the reclamation of law, and I think in substance the provision contained in the Ferris bill. That is simply a statement of facts. It is not a new law. It is simply recognition of the situation as a guide to administrative officers who sometimes forget very basic and fundamental things. They get views and theories that lead them far afield. Some people have suggested—I do not know whether that has been suggested before this committee—that the Supreme Court decision in the Utah case—if that is the term used in connection with that case—in some way raises the question as to the complete control by the States of the waters within their borders, particularly the arid States. I do not think there is a line or a word or a suggestion in that decision that raises any question of that sort * * *"[27]

Representative Mondell's reference to the Reclamation Act [28] and the Ferris Bill[29] was correct in that both provide "That nothing in this Act shall be construed as affecting

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[27] *Ibid.*, 620.

[28] 32 Stat. L. 388, Ch. 1093 (June 17, 1902).

[29] H. R. 16673, 63 Cong. 3rd Sess.

or intended to effect or to in any way interfere with the laws of any State. * * * relating to the control, appropriation, use, or distribution of water * * *". It must be noted, however, that this proposed language appears in Section 27 of the Federal Water Power Act, not in Section 9 (b).[30] It is noteworthy that Representative Mondell indicated that his interpretation of Supreme Court decisions was that the States under the Constitution had complete control of the non-navigable "waters within their borders", and that he referred to his proposal as a "guide to administive officers" and as a recognition of existing constitutional law.

Outside of these two discussions over Section 9 (b) of the substitute bill, none of the other witnesses before the Special Water Power Committee offered any suggestions. The only other suggestions made were minor in nature and were proposed to protect the water rights of the Western States.[31]

The Special Committee did not agree to the proposed alterations in Section 9 (b) of the substitute bill and reported the measure without modification in that section.

After S. 1419 was reported out of the Committee, Representative LaFollette made a short speech[32] in the House praising the proposal and pointing out, in particular, that it did not usurp any of the powers of the various states. Mr. LaFollette explained that.

> "This bill is brought here because it is apparent that we can get no development under a divided authority, and development is needed. * * * under the proposed law the would-be licensee is supposed to have procured all concessions and necessary powers of the State or States in which the proposed project is situated before a license can be issued, thus harmonizing State and Federal interests, making development possible without either transgressing the sovereign powers of the States or conferring on the Federal Government any plenary power not contemplated by the Constitution. Under

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[30] Section 27 provides, "That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

[31] Note 22, *supra*, p. 299 and p. 474.

[32] Cong. Rec., Vol. 56, part 9, p. 9108, 65 Cong. 2d Sess.

> this bill we only allow the commission a supervisory power over those functions entirely within the State's jurisdiction for the period covered by any license, the State having exercised its rights in advance of issue."

In the same speech, Mr. LaFollette also indicated that he thought that the "legislation will prove to be sound in principle and sane in provisions as it comes from the committee, and, what is of transcendent importance, it will, with possibly one or two changes, *stand the test as to constitutionality*" (italics supplied). The "changes to which Mr. LaFollette referred were his proposal to add "bed and banks" to the list of items with which an applicant for a license would "comply". He believed that.

> "If we make it one of the conditions precedent to the procuring of a license that the applicant has complied with the requirements of the State law as to bed, banks, diversion, and use of water, we are most assuredly not infringing any State's right in that respect, but are definitely insisting that the State's rules of property as to water, bed, and banks must have been fully complied with or license can not issue."

When debate on the bill began, Representative LaFollette was the first to speak after the Clerk read Section 9 (b) of the proposed act. His earlier expression of concern as to the constitutionality of the bill was demonstrated by his proposing to amend Section 9 (b) as follows (Mr. LaFollette's proposed addition in italics):[33]

> "(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to the *bed and banks and to* the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purpose of a license under this act."

Mr. LaFollette gave the following reasons for proposing the amendment:[34]

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[33] *Ibid.*, p. 9109.

[34] *Ibid.*, p. 9110.

"Mr. Chairman, in this section, by the provision that the applicant for a license shall have complied with the rules and laws of the State in regard to the diversion of water, we are trying not to infringe the rights of the States in that respect, and I wish to call the attention of the committee to the fact that many Supreme Court decisions in respect to States' rights as to water also refer to States' rights as to the beds and banks, and I would like to read from the latest United States Supreme Court decision upon this question, delivered on May 12, 1917. The opinion was delivered by Mr. Justice Pitney, and in that he says:

> 'The States have authority to establish for themselves such rules of property as they may deem expedient with respect to the streams of water within their borders, both navigable and nonnavigable, and the ownership of the lands forming their beds and banks.'

"'In many States the law gives the riparian owner title to the middle of the stream. In other States only to the high-water mark. The property rights are within the State. It can dispose of the beds, or parts of them, regardless of the riparian ownership of the banks, if it desires to, and that has been done in some States. If we put in this language, which is practically taken from that Supreme Court decision, as to the property rights of the States as to the bed and banks and to the diversion of the water, then it is sure that we have not infringed any of the rights of the States in that respect, or any of their rules of property, and we are trying in this bill above everything else to overcome a divided authority and pass a bill that will make it possible to get developments. We are earnestly trying not to infringe the rights of the States. If possible we want a bill that can not be defeated in the Supreme Court because of omissions, because of the lack of some provision that we should have put in the bill to safeguard the States."

Thus, according to Mr. LaFollette, a member of the Special Committee on Water Power, the *purpose of Section 9 (b) was to avoid infringing on the rights of the states and*

thusly to prevent questions of constitutionality from invalidating the proposed act. The amendment was acceded to by the House.

The next amendment to Section 9 (b), offered by Representative Parker of New Jersey, was to permit an applicant to provide the Commission with satisfactory evidence that he "will comply" with laws of the State, rather than that he "has complied" with such laws.[35] During the debate on the proposed amendment, Representative Mondell said that he understood Section 9 (b) merely to require "a certain applicant shall do certain things, shall comply with certain regulations and certain laws, and *all applicants can do that*" (italics supplied). This amendment failed.

The only other amendment of importance was offered by Representative Raker of California, who proposed that an applicant should provide satisfactory evidence that he had complied with the requirements of the law of the State or States in which the proposed project was to be located, "with respect to application for the right to appropriate, divert, and use."[36] Representative Raker was concerned because most state laws provide that even after an application for water rights is filed, no right can attach until an actual appropriation has been made. Such actual appropriation must by the nature of things be accompanied by substantial expenditures of funds in any case in which the appropriation is important quantitatively. Mr. Raker thought that the proposed commission might require an applicant to obtain a completed water right and he was afraid that after large expenditures an applicant might find himself refused a permit by the proposed commission.

Representative Mondell who, as noted earlier, testified in behalf of the bill, differed from Representative Rankin as to necessity and propriety of his amendment. During the debate on Representative Raker's amendment, Representative Mondell explained his interpretation of the proposed Section 9 (b) as follows (italics supplied):[37]

> "Mr. Chairman, I hope the amendment offered by the gentleman from California (Mr. Raker) will not prevail. I think the gentleman must have offered his

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[35] Cong. Rec., Vol. 56, part 10, p. 9811.

[36] Cong. Rec., Vol. 56, part 10, p. 9812.

[37] *Ibid.*

amendment under a misapprehension of the meaning and effect of the language of the provision. The gentleman is assuming that the language which he attempts to amend requires a completed water right and a water-right certificate before the party shall be granted a license under this act or his application be considered. That is not true at all. The provision is that the applicant shall have complied with the laws of the State with respect to the appropriation, diversion, or use of water; that is, he shall have complied with all of the laws of the State applicable to the situation up to the time he makes his application. As was suggested a moment ago when the amendment offered by the gentleman from New Jersey (Representative Parker) was under consideration, there are other requirements of State law that will apply after the license has been granted and construction begins, requirements that will continue on through the period of construction and through the period of operation. This provision has no refernece to such requirements. It simply requires that the State laws shall be complied with so far as the applicant can comply with them in the nature of things up to the time he makes his application. Now, from the standpoint of the commission very great harm would come if the amendment the gentleman proposes should be adopted. *There are two controlling reasons for the insertion of this paragraph. The first*, from the standpoint of water-power legislation, *is that the water-power commission shall have the benefit of all of the information which the States possess relative to the condition of water supply at the point of proposed diversion.* That is a very important reason for a provision of this kind. * * * *The second reason is so that the bill shall carry with it notice to the commission that they must proceed in accordance with the State laws, which they must do in any event, whether the provision were in the bill or not.*"

Mr. Mondell's explanations were consonant with other statements about Section 9 (b) made during the debate, *i.e.*, the section was for the guidance of the commission and that it was intended to be a restatement of the existing law on the subject.

S. 1419, as entirely rewritten was passed by the House, 231 to 23. Section 9 (b) as passed by the House was accepted by the Senate without alteration or debate.

After some modification in other sections of the bill, the Senate approved the measure and appointed a special committee composed of three members each from the Committee on Commerce and the Committee on Public Lands, to meet with House conferees on the proposed legislation. The conference reported out a compromise which passed the House but which was filibustered to death in the Senate by Senator LaFollette of Wisconsin in order to prevent passage of the pending General Deficiencies bill, which he hoped in turn would force President Wilson to call a special session in Congress and thus prevent him from attending the Peace Conference in Paris.[38]

At the very next session of Congress, S. 1419 as agreed to by the conferees, was introduced in the House as H. R. 3184, and a new special Committee on Water Power was appointed. Inasmuch as the newly constituted special Committee was practically the same as the old one and in view of the volume of hearings already produced on the subject, the new Committee reported out the bill without further hearings. Section 9 (b) was left unaltered in the new bill.

There was no debate on Section 9 (b) directly in the new session of Congress. There were two oblique references to the section made in the House, however, which might be noted. In response to a query of Representative Goodykoontz of West Virginia as to whether or not a dam could be erected on the Kanawha River in defiance of the wishes of the people below the site of the proposed dam who might be concerned for their safety in the event of a break in the dam, Representative Sinott quoted Section 9 (b).[39] Mr. Sinott also indicated that in his opinion Section 9 (b) applied before as well as subsequently to the issuance of a license.[40] There was no mention in the Senate of Section 9 (b) of the new bill.

H. R. 3184 was passed by the House and the Senate and became law when the President signed the bill June 10, 1920.

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[38] For a description of the occasion and of President Wilson sitting in the Capitol to await the outcome, see New York Times, March 5, 1919.

[39] Cong. Rec., Vol. 58, Part 3, pp. 2225-2226.

[40] *Ibid.*

c. *Summary*

Although the legislative history of the Federal Water Power Act is exasperatingly voluminous, the foregoing references to Section 9 (b) are the only ones relating directly to that provision. These references, unfortunately, are far too few and were made for the most part without a careful choice of expression. Excerpts from statements made during the hearings and the debate on Section 9(b) can be quoted either in support of the proposition that the section *is* or is *not* a limitation on the licensing power of the Federal Power Commission. There was a great deal of chattering about "compliance with state laws" in the historical development of the section, without anyone clearly defining what was intended by the phrase.

There is, however, no evidence that Congress intended Section 9 (b) to be a limitation on the licensing power of the Federal Power Commission, there is some evidence that Congress did not intend it to be a limitation, there is considerable evidence that Congress did intend it to be a guide for administrative officers, and there is considerable evidence that Congress intended it to be a restatement of existing constitutional law on the subject.

The magnifying glass approach to the legislative history is an unsatisfactory method of determining the ultimate intent of Congress in inserting Section 9 (b). True perspective of the position the Section occupies in the Federal Water Power Act is retained, however, if it be remembered that Congress was embarking on an absolutely new and untried field of federal regulation and was consequently eager to prevent the legislative innovation from being declared unconstitutional by the courts. This eagerness was, in part, responsible for the insertion of Section 9 (b).

There is, moreover, little doubt that Congress desired to avoid as much conflict as possible between the national and state governments in the administration of the Federal Water Power Act. To this end Section 9 (b) appeared a reasonable solution. Though not clearly evident from the wording of the section, the weight of the evidence revealed in the legislative history of Section 9 (b) supports the conclusion that when Congress provided that an applicant must submit "satisfactory evidence" of compliance with state laws, Congress intended for an applicant to comply only with such state laws as did not interfere with the erection of

a power project under the supervision of the Federal Power Commission. Congress contemplated that Section 9 (b) should be viewed as a legislative declaration of policy, not as a condition precedent to the granting of a license.

In administering the Federal Water Power Act, the Federal Power Commission should, in conformance with Congressional policy, insist that an applicant comply with all the laws of the state or states, within which he proposes to locate a project, which do not thwart the express will of Congress to provide for a comprehensive scheme of navigation and water power development.

Although the legislative history of Section 9 (b) supports these conclusions, it is appropriate to investigate the propriety of examining the legislative history of the Section, the interpretation given the Section by the Commission and the courts, and the constitutional questions involved, before arriving at a final conclusion.

PART XI—SUMMARY AND CONCLUSION.

The Federal Water Power Act was passed by Congress in response to a demand for comprehensive water power legislation. Congress intended that, within constitutional limits, the Federal Power Commission should implement the Congressional policy expressed in the Act. Congress also desired that the Commission should administer the Federal Water Power Act with a minimum of conflict with the laws of the various states.

In part to achieve this end, Congress inserted Section 9 (b) in the Federal Water Power Act. Section 9 (b) should be considered, however, only as a Congressional declaration of policy to harmonize Federal power activities with those of the several states, not as a condition precedent to the granting of a license by the Federal Power Commission. The Commission should, in the interests of comity, carry out this direction of Congress as long as State laws do not impede the general intent of Congress as expressed in the entire Act.

Congress further desired to point out to the courts that it had no intention of invading the police and tax powers reposing in the States under the Constitution. To this end also, Section 9 (b) was inserted in the Federal Water Power Act.

Because of the questions which arise regarding Section 9 (b), it is appropriate and necessary to study the legislative history of the Federal Water Power Act to determine the intent of Congress.

Until 1944 the Federal Power Commission administered the Federal Water Power Act in conformance with the policy expressed by Congress. The Commission has compelled applicants for a license to comply with the provisions of the laws of the various states when such compliance was constitutionally necessary. The Commission has, in addition, required compliance with the laws of the various states when such compliance did not impede the general policies expressed in the Federal Water Power Act. On January 29, 1944, however, when a situation was presented whereby compliance with state laws prevented a comprehensive scheme of water power development, the Federal Power Commission ruled that Section 9 (b) of the Federal Water Power Act was mandatory, not directory as to policy. The Commission inferentially held that Section 9(b) contemplated an abandonment by the Federal Government of the concurrent and usually exclusive jurisdiction it exercises over the streams of the nation in favor of the States, if state statutes required such an abandonment. This ruling apparently was made without recourse to the legislative history of Section 9 (b), without citation of authority, and in complete disregard of the judicial interpretation given since 1920 to the Federal Water Power Act and its various sections.

The courts have repeatedly emphasized the intention of Congress to provide for comprehensive water power development by the Federal Water Power Act and have consistently upheld a broad constitutional basis of authority for the Federal Power Commission to carry out the provisions of the Act. The courts have, furthermore, indicated by the interpretation of sections of the Federal Water Power Act similar to Section 9 (b) that such provisions recognize rights acquired under state laws, but that such rights may be extinguished by eminent domain proceedings instituted in accordance with the Act.

Considering all the factors enumerated above and elsewhere in this paper, the ultimate conclusion is that Section 9 (b) of the Federal Water Power Act requires compliance with the laws of the State or States within which an

applicant proposes to locate a project when the Federal Constitution requires such compliance, but that compliance with other state laws is a problem for administrative determination by the Federal Power Commission in the light of policy as expressed by Congress in the Federal Water Power Act.

LEGISLATIVE HISTORY OF FEDERAL POWER ACT, WITH PARTICULAR REFERENCE TO SECTIONS 9 (b) and 27*

The bills which led to the enactment of the Federal Water Power Act in 1920 may be divided into the navigable waters bills and the public lands bills.

The navigable waters bills were the Adamson Bill of 1914, H. R. 16053, 63rd Cong., 2nd Sess., the Adamson Bill of 1916, S. 3331, 64th Cong., 1st Sess., and the Shields Bill of 1917, S. 1419, 65th Cong., 2nd Sess., later amended by incorporating the provisions of H. R. 8716, 65th Cong., 2nd Sess., which changed it to the present Federal Water Power Act.

The public lands bills were the Ferris Bill of 1914, H. R. 16673, 63rd Cong., 3rd Sess., and the Ferris Bill of 1916, H. R. 408, 64th Cong., 1st Sess.

The bill which became the Federal Water Power Act was H. R. 3184, 66th Cong., 1st Sess.

Section 9 (b). The provisions of Section 9 (b) of the Federal Water Power Act for the submission of evidence with respect to the applicant's compliance with requirements of certain specified kinds of State laws are in striking contrast to the corresponding provisions which first appeared in the antecedent navigable waters bills and which made compliance with State laws in general a condition precedent to the issuance of the Federal permit.

The Adamson Bill of 1914 in Section 14 had a provision to the effect "that the Secretary of War, upon the advice and with the approval of the Chief of Engineers, may lease to any applicant *having complied with the laws of the state* in which the dam is constructed or to be constructed by the United States, the right to develop power from the surplus water over and above that required for navigation at any navigation dam now or hereafter constructed * * *." 51 Cong. Rec. 12407. [Emphasis supplied.]

The Adamson Bill of 1916, S. 3331, had a provision in Section 2 regarding compliance with state laws, reading as follows:

> As between contesting applicants for a permit hereunder having the legal qualifications required by this

* Taken from Brief of Counsel for the Federal Power Commission as filed with the Court below.

Act, and being equally well qualified to improve or develop waterways for the uses of interstate or foreign commerce, preference shall be given to that applicant which is best qualified to expedite and realize the maximum useful development of all the water resources of the region; and as between such contesting applicants which appear equally well qualified in such respect, then preference shall be given to that applicant which *has first complied with the laws of the State or States* in which the dam or diversion structure is to be constructed. [Emphasis supplied.]

The Shields bill, S. 1419, in its original form, contained provisions similar to that in the Adamson bills as to compliance with State law with the provision added to the effect that in all cases the permittee must first obtain the consent of the State or States in which the dam is to be constructed, reading as follows:

As between contesting applicants for a permit hereunder having the legal qualifications required by this Act, and being equally well qualified to comply with the conditions imposed herein, preference shall be given to that applicant which *has first acquired the right to divert the water of the stream* by means of the dam to erect which the permit is sought *and otherwise complied with the laws of the State or States* in which the dam or diversion structure is to be constructed; or if there are no State laws to be complied with the preference shall be given to the first applicant. In granting permits hereunder and fixing conditions thereof, and in prescribing rules and regulations as to the maintenance and operation of any structure to which this Act is applicable, the Secretary of War, before acting, shall have the report and advice of the Chief of Engineers: *Provided, however*, That before the permit shall be granted under this Act, the permittee must first obtain, in such manner as may be required by the laws of the States, *the consent of the State or States* in which the dam or other structure for the development of the water power is proposed to be constructed. [Italics supplied.]

The first provision[1] corresponding to Section 9 (b) to appear in the antecedent public lands bills was in the second Ferris bill of 1916, H. R. 408, which contained the following provision:

> *Provided,* That no lease shall be granted until the applicant *has complied with the requirements of the laws* of the State, States, or Territory wherein said project is to be located, providing for the appropriation of water to develop or generate the electrical energy intended to be generated by applicant's proposed project. [Italics supplied.]

The first combined navigable waters and public lands bill was H. R. 8716, introduced January 15, 1918, as the House substitute for the original Shields bill, S. 1419, and subsequently adopted in the House as an amendment to S. 1419. Section 9 (b) of the House substitute was identical with Section 9 (b) of the Federal Water Power Act as subsequently enacted, except that it did not include the words "bed and banks and" which were added by amendment in the House (56 Cong. Rec. 9810, 9811). Section 9 (b) in the House substitute, H. R. 8716, marked a distinct departure from the corresponding provisions in the antecedent bills. Not only was all language requiring State "consent" omitted, but the language with respect to compliance with State laws was changed in two respects: first, the State laws referred to were narrowly limited to those "with respect to the appropriation, diversion, and use of water for power purposes, and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act." Second, instead of making compliance with State laws a condition precedent to the issuance of the license, the Commission was authorized, in its discretion, if it should consider that the applicant had not submitted "satisfactory evidence" of compliance with State law, to refuse to proceed further administratively with consideration of the application.

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[1] This provision apparently was an outgrowth of an amendment to Section 1 of the first Ferris bill, H. R. 16673, introduced by the Senate Committee on Public Lands. See Sen. Rep. 898, 63rd Cong., 3rd Sess., pp. 1, 4, 5.

The various attempts to amend the language of Section 9 (b) as it appeared in the House substitute, H. R. 8716, and the committee reports and debates relating thereto, confirm this understanding of the Congressional purpose.

The first amendment proposed was that recommended by the Secretaries of War, Interior and Agriculture, who, in a letter dated February 17, 1918, to Honorable T. W. Sims, Chairman of the Special House Committee on Water Power, submitted their proposed amendments to H. R. 8716 (House Rep. 715, 65th Cong., 2nd Sess.) to accompany S. 1419, pp. 29-39. The Secretaries proposed to change Section 9 (b) so as to require the submission of satisfactory evidence of compliance with State laws with respect to "*application* for the right to appropriate (etc.)," instead of compliance with State laws with respect to "the *appropriation* (etc.)". This proposed amendment was not adopted by the committee and was thereafter offered on the floor of the House by Representative Raker as an amendment to Section 9 (b) (56 Cong. Rec. 9812).

> Mr. RAKER. * * * Now, let me call this to the attention of the committee: Here is an application according to the laws of my State and of the other States, where he has complied with the water laws in making his application for a right to use the water. He has absolutely no right, he has nothing in the way of an indefeasible water right, until he has completed the work and placed the water in actual use. Now, when he makes that application this provision in the law to-day is absolutely impossible to be complied with, because you require him to show that he has built the dam and constructed the ditches and put the water to an actual beneficial use before he is ever in a position to do it, when he had paid out, maybe, a million dollars or two million dollars to construct the dam and build the ditches so that he can turn the water into the head and commence to generate electricity. Now, if the man has complied with the law relating to the application for the water right, for its diversion and appropriation and use, and then gets his permit and proceeds and actually develops it according to that project, the moment he turns the water over the wheel the first time, or turns it upon the land to irrigate it, his right is complete and retroacts back to the time when he gave the

notice, and no intervening party can come along and prevent it in the meantime. But to say that he must prove a valid water right at the time of making the application, I tell you it can not be done. * * * (56 Cong. Rec. 9813.)

The viewpoint of those who opposed Congressman Raker's amendment and who ultimately prevailed is indicated by the following statements by Congressmen Mondell and Walsh:

Mr. MONDELL. The gentleman's argument is all based on the assumption that this paragraph requires the perfection of a water right. There is nothing in the paragraph that requires the perfection of a water right (56 Cong. Rec. 9813).

Mr. MONDELL. The bill provides that all provisions of the law, whatever they may be, shall have been complied with up to that time (56 Cong. Rec. 9813).

Mr. WALSH. I think if a person has filed his application for the right to appropriate water, and has complied with the laws respecting the filing of applications, it is not necessary that he should actually have appropriated the water in order for him to be said to have complied with the laws respecting the appropriation of water (56 Cong. Rec. 9813).

Mr. MONDELL. Mr. Chairman, I hope the amendment offered by the gentleman from California [Mr. Raker] will not prevail. I think the gentleman must have offered his amendment under a misapprehension of the meaning and effect of the language of the provision. The gentleman is assuming that the language which he attempt to amend requires a completed water right and a water right certificate before the party shall be granted a license under this act or his application be considered. That is not true at all. The provision is that the applicant shall have complied with the laws of the State with respect to the appropriation, diversion, or use of water; that is, he shall have complied with all of the laws of the State applicable to the situation up to the time he makes his application. As was suggested a moment ago when the amendment offered by the gentleman from New Jersey was under consideration, there are other requirements of State

law that will apply after the license has been granted and construction begins, requirements that will continue on through the period of construction and through the period of operation. This provision has no reference to such requirements. It simply requires that the State laws shall be complied with so far as the applicant can comply with them in the nature of things up to the time he makes his application. Now, from the standpoint of the Commission very great harm would come if the amendment the gentleman proposes should be adopted. There are two controlling reasons for the insertion of this paragraph. The first, from the standpoint of water-power legislation, is that the water-power commission shall have the benefit of all of the information which the States possess relative to the condition of water supply at the point of proposed diversion. That is a very important reason for a provision of this kind. Another reason—(56 Cong. Rec. 9813-9814).

Mr. MONDELL. The second reason is so that the bill shall carry with it notice to the commission that they must proceed in accordance with the State laws, which they must do in any event, whether the provision were in the bill or not (56 Cong. Rec. 9814).

As already stated, the additional words "bed and banks and" were added by an amendment in the House offered by Congressman La Follette, who explained the reason for the amendment as follows:

Mr. LA FOLLETTE. Mr. Chairman, in this section, by the provision that the applicant for a license shall have complied with the rules and laws of the State in regard to the diversion of water, we are trying not to infringe the rights of the States in that respect, and I wish to call the attention of the committee to the fact that many Supreme Court decisions in respect to States' rights as to water also refer to States' rights as to the beds and banks, and I would like to read from the latest United States Supreme Court decision upon this question, delivered on May 12, 1917. The opinion was delivered by Mr. Justice Pitney, and in that he says:

"The States have authority to establish for themselves such rules of property as they may deem expedi-

ent with respect to the streams of water within their borders, both navigable and nonnavigable, and the ownership of the lands forming their beds and banks."[2]

In many States the law gives the riparian owner title to the middle of the stream. In other States only to the high-water mark. The property rights are within the State. It can dispose of the beds, or parts of them, regardless of the riparian ownership of the banks, if it desires to, and that has been done in some States. If we put in this language, which is practically taken from that Supreme Court decision, as to the property rights of the States as to the bed and banks and to the diversion of the water, then it is sure that we have not infringed any of the rights of the States in that respect, or any of their rules of property, and we are trying in this bill above everything else to overcome a divided authority and pass a bill that will make it possible to get development (56 Cong. Rec. 9810-9811).

Thus, the limited scope of the state laws referred to in Section 9 (b) and the clear purpose of Congress not to require state consent to the hydroelectric developments to be licensed by the Commission, finds corroboration at every stage in the legislative history of the provision.

Section 27. In the case of Section 27 the outstanding fact in its legislative history is its derivation through the public lands bills from Section 8 of the Reclamation Law of 1902, c. 1093 (32 Stat. 390), U. S. C. Title 43, §383, reading as follows:

Nothing in sections 372, 373, 381, 383, 391, 392, 411, 416, 419, 421, 431, 432, 434, 439, 461, 491 and 498 of this title shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of such sections, shall proceed in conformity with such laws, and nothing in such section shall in any way affect any right of any State or of the Federal Government

[2] The language quoted by Congressman La Follette will be found in *United States* v. *Cress*, 243 U. S. 316, 319.

or of any landowner, appropriator, or user of water in, to or from any interstate stream or the waters thereof. (June 17, 1902, ch. 1093, §8, 32 Stat. 390.)

This language was reflected in Section 14 of the Ferris Bill of 1914, H. R. 16,673, which reads as follows:

> SECTION 14. That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired thereunder.

Congressman Mondell's discussion of this provision in the second Ferris Bill makes it even clearer that the provision was based upon the proprietary nature of the interests of the United States and was intended to relate particularly to the public land states of the West in which the law of prior appropriation obtained:

> Mr. MONDELL. Water Rights Under State Control. Let us not forget that the primary and essential right upon which any enterprise of this character is based in the public-land States is a right received from the people of the State and not from the Federal Government. The people of the Commonwealths of the West are the owners and proprietors of all the waters within their borders, and the only right that any individual can have or secure, at least in the majority of the public-land States, is the right to use the water at a certain designated place for a specific and useful purpose; and the right continues so long as at that place for that purpose those waters are beneficially applied. The Federal Government can give no grant of right to build power plants on public lands in the Western States that will carry with it any right to divert a drop of water or to use a drop of water for the turning of any wheel or turbine. That right, under the laws of the States, recognized by the Federal Constitution and the courts, must be secured from the people though the authorities they have provided in the States. That right in all of the States is perpetual, so long as the water shall be used at that place for that beneficial purpose (51 Cong. Rec. 13630-13631).

A broader version of the provision appeared in the Ferris Bill of 1916, H. R. 408.

> SEC. 13. That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State relating to the control, appropriation, use, or distribution of water.

This provision did not reappear in the first combined navigable waters and public lands bill, H. R. 8716, but reappeared in the narrower original form in the amended Shields Bill, S. 1419, and H. R. 3184, and was enacted as Section 27 of the Federal Water Power Act in substantially the original form. Section 27, as enacted, reads:

> That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water *used in irrigation or for municipal or other uses, or any vested right acquired therein.* [Italics supplied.]

Thus the origin and history of Section 27 confirms what a consideration of its language indicates, that the state laws therein referred to are laws governing property rights, particularly the laws of the public lands states in which the law of prior appropriations obtains.

No. 603

Supreme Court of the United States,

OCTOBER TERM, 1945.

FIRST IOWA HYDRO-ELECTRIC COOPERATIVE, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*,
STATE OF IOWA, *Intervenor*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR FIRST IOWA HYDRO-ELECTRIC COOPERATIVE

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February 6, 1946.

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BRIEF FOR FIRST IOWA HYDRO-ELECTRIC COOPERATIVE

OPINIONS BELOW.

The opinion of the Court of Appeals for the District of Columbia (R. 34-42) is reported in 151 F. (2d) 20. The opinion and order of the Federal Power Commission (R. 8-14) are reported in 52 P. U. R. (NS) 82.

JURISDICTION.

The judgment of the Court of Appeals for the District of Columbia was entered on August 13, 1945. The petition for writ of certiorari was filed on November 13, 1945, and was granted on January 2, 1946. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, (28 U. S. C. § 347) and Section 313(b) of the Federal Power Act (49 Stat. 860, 16 U. S. C. § 825 *l*).

STATUTE INVOLVED.

The pertinent provisions of the Federal Power Act (June 10, 1920, c. 285, 41 Stat. 1063, amended August 26, 1935, c. 687, 49 Stat. 838, 16 U. S. C. § 791a) are set forth in the Appendix, infra.

QUESTIONS PRESENTED.

Upon consideration of an application filed on August 11, 1941, by petitioner for a license under Part I of the Federal Power Act to authorize the construction and operation of a power development on the Cedar River in Cedar and Muscatine Counties in the State of Iowa, and extending to the Mississippi River north of Muscatine, Iowa, the Federal Power Commission found that petitioner had not submitted satisfactory evidence of compliance with laws of the State of Iowa, as required by Section 9(b)[1] of the Federal Power Act, in that petitioner had not obtained a permit from from the State Executive Council authorizing the project. The questions presented are:

1. Whether a state permit is required for the construction of the proposed power project on the Cedar River in the State of Iowa, as provided in Chapter 363 of the Iowa Code of 1939, when, upon a declaration of intention filed pursuant to Section 23(b) of the Federal Power Act to construct the very project here in question, the Federal Power Commission in its Finding of June 3, 1941,[2] (a final determination from which no appeal was taken) found that the Cedar River, and the Iowa River into which the Cedar flows, are navigable waters of the United States; that the interests of interstate commerce would be affected by the construction of the proposed project; that lands of the United States would be flooded and occupied; and that "A license for the construction proposed * * * is required under the provisions of the Federal Power Act."

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[1] Appendix, p. 6.

[2] Appendix, pp. 1-4 (2 F. P. C. 958).

2. Whether the Federal Power Commission erred in dismissing petitioner's application for a federal license upon the finding that petitioner "has not presented satisfactory evidence pursuant to Section 9(b) of the Federal Power Act, of compliance with the requirements of *applicable* laws of the State of Iowa requiring a permit from the State Executive Counsel to effect the purposes of a license under the Federal Power Act, . . ."[3] (Italics supplied.)

3. Whether the Court below was in error in holding that Chapter 363 of the Iowa Code of 1939 has valid application in so far as navigable waters of the United States, within the State of Iowa, are concerned.

4. Whether the Court below was in error in holding that Congress in enacting Part I of the Federal Power Act did not completely occupy the field of regulation with respect to the construction, operation and maintenance of hydro-electric projects upon navigable waters of the United States.

5. Whether the Court below erred in holding that "The Commission, properly, insisted upon a good faith effort, by its applicant, [petitioner herein] to comply with the State law", and in failing to give effect to the opinion of the Attorney General of Iowa that the State Executive Council could not legally issue a permit to petitioner for the project involved (R. ~~19~~ 38).

6. Whether, with respect to navigable waters of the United States within the State of Iowa, Chapter 363 of the Iowa Code of 1939 was superseded by the Federal Water Power Act of 1920, as amended, which became Part I of the Federal Power Act of 1935 by Title II of the Public Utility Act of 1935 (49 Stat. 838).

7. Whether the Court below erred in holding that, with respect to the construction of power projects upon naviga-

[3] R. 18. (The word "Applicable" does not appear in Section 9 (b).)

ble waters of the United States requiring a federal license under Part I of the Federal Power Act, Section 9(b) of the Act, like Section 27, effectively *saved* certain State laws which otherwise would have been superseded.

8. Whether the Court below erred in holding that Section 9(b) of the Federal Power Act, "expresses the major intention of Congress that the States and the National Government shall participate jointly in the development and regulation of water power projects", in view of the express provisions of Section 23(b) and the findings of the Federal Power Commission that a license, in accordance with the provisions of the Federal Power Act, was required for petitioner's project.[4]

9. Whether the Court below erred in holding that, with respect to the proposed project upon the Cedar River in the State of Iowa, a navigable river of the United States, petitioner's failure to comply with Section 7796 of the Iowa Code of 1939 which provides that whenever the erection of a dam affects highways, the applicant for a State permit to construct such dam, "shall as a condition precedent secure a permit from the board, commission, or other official body charged with jurisdiction over and control of said highways • • • ", constituted a failure to comply with Section 9(b) of the Federal Power Act and "For this reason alone, therefore, the Commission's order must stand." (R. 68).

10. Whether the Court below erred in holding "that the area of law covered" by Sections 7767 and 7771 of the Iowa Code of 1939, is "so obviously within the domain of the State's power that Congressional intention, to supersede the disputed state laws, must much more clearly appear than it does in the Power Act." (R. 69).

11. Whether the Court erred in holding that Chapter 363 of the Iowa Code of 1939 did not "stand as an obstacle to

[4] The Commission's findings are contained in its Order of June 3, 1941, Appendix, pp. 1-4 (2 F. P. C. 968).

the accomplishment and execution of the full purposes and objectives of Congress" as announced in Part I of the Federal Power Act. (R. 72.)

12. Whether Sections 7767, 7771 and 7796 of Chapter 363 of the Iowa Code can be separated from context and given effect as separate provisions of law, in disregard of the fact that such sections are but coordinate parts of Chapter 363.

STATEMENT.

The Petitioner.

First Iowa Hydro-Electric Cooperative, the petitioner, is a non-profit cooperative association, organized under the laws of the State of Iowa and having its office and principal place of business in Muscatine, Iowa.

The Statute.

Under Section 4(e) of the Federal Power Act [16 U. S. C. 797(e)], the Commission is authorized to issue licenses to citizens of the United States or to any corporation organized under the laws of the United States, or of a state thereof, or to any State or municipality, for the purpose of constructing, operating and maintaining dams or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission and utilization of power derived from any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several states.

Section 23(b) of the Act[5] makes it unlawful to construct, operate or maintain any dam, power house or other work incidental thereto across, along or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States, except under and in accordance with a permit granted prior to June 10,

[5] Appendix, p. 7.

1920, or a license granted pursuant to the Federal Power Act.

The section further provides that any person intending to construct a dam or other project works across, along or in any stream *other than those defined as navigable waters of the United States* and over which Congress has jurisdiction under its authority to regulate commerce, shall before such construction file a declaration of such intention with the Federal Power Commission. Whereupon the Commission is required to cause immediate investigation of such proposed construction to be made and *if it shall find* that the interests of interstate or foreign commerce would be affected by such proposed construction such person shall not construct, maintain or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of the Federal Power Act. *If the Commission shall not so find*, and if no public lands or reservations are affected, permission is granted to construct such dam or other project works in such stream upon compliance with State laws.

Section 9(b) provides that each applicant for a license under the Act shall submit to the Commission "Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power and in any other business necessary to effect the purposes of a license under this Act."

The Proceeding Before the Commission.

On January 29, 1940, petitioner, as required by Section 23(b) of the Federal Power Act [16 U. S. C. 817], filed a declaration of intention with the Federal Power Commission for a run-of-river hydroelectric development to be located on the Cedar River, in Cedar and Muscatine Counties,

Iowa. Thereafter, on April 2, 1941, the original declaration of intention was supplemented to extend the power development, by means of a diversion canal, to the Mississippi River north of Muscatine, Iowa. On June 3, 1941, the Federal Power Commission found that the Cedar River, as well as the Iowa River into which the Cedar River flows, are navigable waters of the United States; that the interests of interstate commerce would be affected by the proposed construction; that public lands of the United States would be flooded and occupied; and that "A license for the construction proposed * * * is required under the provisions of the Federal Power Act."

Thereafter, on August 11, 1941, petitioner filed an application with the Federal Power Commission for a license under Section 4(e) [16 U. S. C. 797(e)] authorizing the construction, operation and maintenance of the proposed power development.

The State of Iowa was permitted to intervene and, after extended hearings, the Commission on January 29, 1944, dismissed petitioner's application for a license upon the finding that:

> "The applicant has not presented satisfactory evidence, pursuant to Section 9(b) of the Federal Power Act, of compliance with the requirements of applicable laws of the State of Iowa requiring a permit from the State Executive Council to effect the purposes of a license under the Federal Power Act, and the pending application, as supplemented, should be dismissed without prejudice." (R. 18)

On February 29, 1944, petitioner filed an application for rehearing pursuant to Section 313(a) of the Federal Power Act [16 U. S. C. 825 *l*(b)]. Thereafter, on March 7, 1944, the Commission entered an order denying the application for rehearing with the following finding:

> "The Commission *finds* that:
>
> "No useful purpose would be served by granting the petition for rehearing and that reconsideration of the

order of January 29, 1944, dismissing the application for license would not be appropriate." (R. 27.)

The Opinion Below.

On review, the Court below affirmed the Commission's order upon the ground, among others, that petitioner had not complied with the provisions of Section 9(b) of the Federal Power Act [16 U. S. C. 802(b)], by reason of its failure to obtain a permit from the Executive Council of the State of Iowa authorizing the construction, operation and maintenance of the hydroelectric development in question as provided by Chapter 363 of the Iowa Code; and that petitioner had otherwise failed to comply with Sections 7767, 7771 and 7796 of Chapter 363 of the Iowa Code.

SPECIFICATIONS OF ERRORS TO BE URGED.

The Court below erred:

1. In refusing to construe Section 9(b) of the Federal Power Act.
2. In failing to hold that Section 23(b) of the Federal Power Act represented a determination by Congress to maintain and exercise exclusive control and regulation over the construction of power projects upon navigable waters of the United States.
3. In failing to hold that petitioner had presented satisfactory evidence of compliance with the requirements of Section 9(b) of the Federal Power Act.
4. In failing to hold in so far as petitioner's proposed project is concerned, that Chapter 363 of the Iowa Code was superseded by the Federal Power Act when the Commission made its determination on June 3, 1941, that a license was required under the Federal Power Act.
5. In failing to hold that petitioner was under no obligation to comply with Chapter 363 of the Iowa code.

6. In failing to hold that petitioner was under no obligation to comply with individual sections of Chapter 363 of the Iowa Code.

7. In failing to hold that Section 9(b) did not save Chapter 363 of the Iowa Code.

8. In holding that petitioner failed to exhaust its administrative remedies.

9. In failing to reverse the decision of the Federal Power Commission.

SUMMARY OF ARGUMENT.

On June 3, 1941, the Federal Power Commission acting upon a declaration of intention filed by petitioner for authority to construct a power project upon the Cedar River in the State of Iowa, found that the Cedar River was a navigable water of the United States, that the proposed project would affect the interests of interstate and foreign commerce, that public lands of the United States would be flooded and occupied, and that a Federal license under the provisions of the Federal Power Act was required. Thereafter petitioner applied for a Federal license and the Commission, after extended hearings, dismissed petitioner's application upon the finding that it had not submitted satisfactory evidence of compliance with the requirements of the laws of the State of Iowa, in that it had not shown compliance with the requirements of Chapter 363 of the laws of that State, providing for a permit for the construction of power projects upon navigable waters within the borders of the State.

Congress in the Federal Power Act provided a comprehensive scheme for the regulation and development of water power projects. Section 23(b) of the Federal Power Act provides that a license from the Federal Power Commission is required for the construction of a power project upon navigable waters of the United States. Congress therein asserted exclusive power and authority over power

projects upon navigable waters of the United States, as well as power projects upon other waters where the interests of interstate or foreign commerce were affected.

All laws of the State of Iowa with respect to the construction of power projects upon waters flowing within its borders are embodied in Chapter 363 of the Iowa Code which is a comprehensive water power act. Section 23(b) of the Federal Power Act determines the permissive range within which power projects may be constructed pursuant to the provisions of Chapter 363. The legislative history of the Federal Power Act and of Section 9(b) of that Act shows that Congress did not intend that there should be any divided authority over the licensing of power projects (1) on navigable waters of the United States, or (2) where the interest of interstate or foreign commerce would be affected by such construction upon waters not defined as waters of the United States.

The Federal Power Commission and the Court below were in error in holding that petitioner's application for a license should be dismissed because of its failure to obtain a State permit under the provisions of Chapter 363 of the Iowa Code. If Section 9(b) can be construed to require a permit from the State of Iowa, as a condition precedent to the issuance of a license by the Federal Power Commission, petitioner is placed in an impossible position. If authorization is obtained from both State and Federal authorities, the question immediately arises as to which one of the two authorities is petitioner to obey. A license under the Federal Power Act and a permit under Chapter 363 of the Iowa Code would relate to the same subject matter in so far as construction, operation and maintenance of the project is concerned, the term of the permit or license, plans and specifications regarding construction and many similar phases relating to the regulation of a project constructed under permissive authority. The legislative history of Section 9(b) shows that it was not the intent of Congress that the consent of a State authority was to be required as a con-

dition to the grant of a license by the Federal Power Commission.

The decisions of this Court make it clear that the power and authority of Congress expressed in the Federal Power Act is exclusive. If Section 9(b) may be construed to require that a State permit is necessary, before petitioner can comply with the requirements of Section 9(b), then the State, by withholding such a permit or providing terms and conditions impossible of accomplishment, has veto power over the issuance of a license by the Federal Power Commission for the construction of a power project upon navigable waters of the United States.

There is no basis for the claim that Section 9(b) provides for the exercise of joint State and Federal control of power projects to be located upon navigable waters of the United States. Subsections 9(a) and 9(c) of the Federal Power Act are indicative of the true import of the entire section. The legislative history shows that the clear intent of Congress with respect to Section 9(b) was to require the type of information which would demonstrate to the Federal Power Commission that an applicant for a license was duly authorized to engage in business to effectuate the purposes of the license and that a water suppy for the power project was available at the point of proposed diversion. To construe Section 9(b) as the Federal Power Commission and the Court below propose would violate the very words of the section, the Federal Power Act as a whole, its purposes, and the intent of Congress. Under the construction of Section 9(b), proposed by the Court below, States and Territories instead of the Federal government would have jurisdiction over power projects upon navigable waters of the United States.

The Court below was clearly in error in holding that the Federal Power Commission properly required petitioner to make a good faith effort to comply with the provisions of Chapter 363 of the Iowa Code. At the same time the Court held that the State was not to be given a veto power over

the issuance of a license by the Federal Power Commission for the construction of a power project upon navigable waters of the United States. These alternate positions by the Court below seem to indicate that petitioner must undertake to comply with Chapter 363 of the Iowa Code and, if it fails by reason of the fact that the State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress as expressed in the Federal Power Act, then petitioner is relieved from such compliance. The Court further avoids a construction of Section 9(b) by assuming that it must first construe the State law. Petitioner is seeking a construction of Section 9(b) and related sections of the Federal Power Act. Petitioner does not seek a construction of the State law. Petitioner is entitled to have the question as to the meaning of Section 9(b) and its true import answered by a Federal Court having jurisdiction. The main question is: Does Section 9(b) mean that petitioner must obtain a permit from the Executive Council of the State of Iowa before it is entitled to a license from the Federal Power Commission for the construction of a power project upon the Cedar River—a navigable water of the United States. Since the question is a Federal question to be considered and determined by a Federal Court, State laws are involved only to the extent necessary to arrive at a proper construction and interpretation of an Act of Congress.

ARGUMENT.

I.

A State Permit is Not Required for the Construction by Petitioner of the Proposed Power Project on the Cedar River in the State of Iowa as Provided in Chapter 363 of the Iowa Code of 1939 Since the Federal Power Commission in Its Determination Upon a Declaration of Intention Filed Pursuant to Section 23(b) of the Federal Power Act Found that a License for the Construction Proposed is Required Under the Provisions of the Federal Power Act.

A. Section 23(b) of the Federal Power Act provides the rule which determines whether a license from the Federal Power Commission is required for petitioner's proposed power project on the Cedar River in the State of Iowa, or whether such project may be constructed in such stream upon compliance with state laws.

Section 23(b) of the Federal Power Act is clear beyond question. A license from the Federal Power Commission is required for the construction, operation, or maintenance of a dam or other project works for electric power development "across, along or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States * * *." *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 399; *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 123 F. 2d 155, certiorari denied, 315 U. S. 806; *Niagara Falls Power Co.* v. *Federal Power Commission*, 137 F. 2d 787, certiorari denied, 320 U. S. 792; *Wisconsin Public Service Corporation* v. *Federal Power Commission*, 147 F. 2d 743, certiorari denied, June 18, 1945. On the other hand, where doubt exists as to whether such a license is required, Section 23(b) is equally clear and specific as to the procedure required. It provides as follows:

> "Any person, association, corporation, State, or municipality intending to construct a dam or other project

> works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several states shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction such person, association, corporation, State or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act."

Congress by these provisions provided an effective procedure to determine whether the proposed construction would affect the interests of interstate or foreign commerce. When the Commission finds that interstate or foreign commerce will be affected, although the proposed construction is not upon navigable waters of the United States, a license from the Federal Power Commission is nevertheless required.

Finally, Section 23(b) provides that a proposed power project may be constructed "upon compliance with State laws", only when the Federal Power Commission finds (1) that the proposed construction is not upon navigable waters of the United States; (2) that no public lands of the United States are involved; and (3) that the interests of interstate and foreign commerce will not be affected. The pertinent provisions of Section 23(b) in this regard are:

> "If the Commission shall not so find (that the waters of the stream in question are navigable waters of the United States; and that the interests of interstate and foreign commerce would be affected by the proposed construction) and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws."

In the case at bar, the Federal Power Commission, acting upon a declaration of intention filed by petitioner respecting the proposed project on the Cedar River, found that a license under the provisions of the Federal Power Act is required.

On January 29, 1940, petitioner filed a declaration of intention with the Federal Power Commission pursuant to the provisions of Section 23(b) of the Federal Power Act, for a run-of-river hydro-electric development on the Cedar River in the State of Iowa. This declaration of intention was supplemented on April 2, 1941, to extend the power development, by means of a diversion canal, to the Mississippi River north of Muscatine, Iowa. On June 3, 1941, the Federal Power Commission acted upon the declaration of intention, as supplemented, and found (1) that the Cedar River, and the Iowa River into which the Cedar flows, are navigable waters of the United States; (2) that the interests of interstate commerce will be affected by the proposed construction; (3) that public lands of the United States will be flooded and occupied; and (4) that a license under the provisions of the Federal Power Act is required for the proposed construction.

B. Chapter 363 of the Iowa Code is a comprehensive water power act of the State of Iowa and has no valid application where a license is required under Section 23(b) of the Federal Power Act.

All laws of the State of Iowa relating to obstructions, dams, mill races and water power improvements in streams of the State are contained in Chapter 363 of the Iowa Code of 1939.[6] It is a comprehensive water power act which has

[6] The Attorney General of Iowa at page 11 of Intervenor's Resistance to the Petition for writ of certiorari states: "It is true that the laws of Iowa relative to obstructions in streams, relative to mill races and to dams and to water power improvements, are all contained in Chapter 363 of the Code of Iowa."

The preamble to the Code Commission Bill (Senate File 186).

valid application only when a Federal license is not required under the provisions of Section 23(b) of the Federal Power Act. Specifically, a dam or other project works across, along, over, or in any stream or part thereof, *not a navigable water of the United States*, may be constructed in conformity with the provisions of Chapter 363 only when a declaration of intention, relating to the proposed project, has been filed with the Federal Power Commission and the Commission finds (1) that the interests of interstate or foreign commerce will not be affected by the proposed construction, and (2) that no public lands or reservations will be affected.

That Chapter 363 of the Iowa Code can have valid application only within the permissive range provided by Section 23(b) of the Federal Power Act, is made definite and certain by numerous court decisions. *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 399; *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 123 F. 2d 155, certiorari denied, 315 U. S. 806; *Niagara Falls Power Co.* v. *Federal Power Commission*, 137 F. 2d 787, certiorari denied, 320 U. S. 792; *Wisconsin Public Service Corporation* v. *Federal Power Commission*, 147 F. 2d 743, certiorari denied, June 18, 1945.

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which, with revisions, became Chapter 363 of the Iowa Code of 1924 and of 1939, provided:

> "The general purpose of this bill is to combine and codify into one body two chapters relating to water power improvement. Both these chapters ante-date hydroelectric development, and neither one is available for projecting and utilizing water power improvements in the modern sense. Recent investigations disclose that thousands of horsepower could be made available for industrial development under proper provisions of law. While the bill prescribes, with some modifications, the ancient mill dam and race statute, the two bodies of law are combined and broadened by the proposals of the bill in an effort to promote and encourage water power development."

Chapter 363 of the Iowa Code is printed in full in the Appendix hereto, pp. 9-17.

In *Wisconsin Public Service Corporation* v. *Federal Power Commission*, a license was required, under the provisions of the Federal Power Act, for the operation and maintenance of a dam in the Wisconsin River constructed under a license granted on February 26, 1887, by the Legislature of the State of Wisconsin. At pages 748 and 749 the Court said:

> "'Corporation [Wisconsin Public Service Corporation] makes the point that since authority to construct and maintain the dam had been granted by the State of Wisconsin, it constituted a permit for the reconstruction of the dam, and the Commission was without power to require the Corporation to take out a license under the Federal Power Act.
>
> * * * * *
>
> "But § 23(b) of the Act provides: 'It shall be unlawful for any person, State, or municipality, * * * to construct, operate, or maintain any dam * * * in any of the navigable waters of the United States * * * except under and in accordance with the terms of a permit * * * granted prior to June 10, 1920, or a license granted pursuant to this Act.'
>
> "The contention that the Act does not apply to dams constructed before the passage of the Federal Power Act was considered in Pennsylvania Water & Power Co. v. Federal Power Commission, 74 App. D. C. 351, 123 F. 2d 155, certiorari denied, 315 U. S. 806, 62 S. Ct. 640, 86 L. Ed. 1205. In that case, in disposing of the contention the court, 123 F. 2d at page 163, said:
>
> 'To sustain petitioner's position in this respect would be to disregard the plain language of the Act. Section 23 makes it unlawful "to construct, operate, or maintain * * *" a dam in a navigable water of the United States without a license. Petitioner is maintaining its dam contrary to this provision. It cannot be considered, we think, that Congress meant to allow existing obstructions to continue unregulated in the navigable streams of the United States.'

"Another case in which a similar contention was made is Niagara Falls Power Co. v. Federal Power Commission 2 Cir., 137 F. 2d 787, certiorari denied, 320 U. S. 815, 64 S. Ct. 206. In that case the company also sought to set aside an order of the Commission. It, too, contended that at the time it applied for its license, it had a permit which had been issued by the State of New York. The court rejected the contention and held that no prescription could run against the United States, and that *the State's license, being beyond its powers, did not give the company any right to seize upon the energy of the nation's streams, or to impair their navigability.*" (Italics added)

Thus, if a state license or permit is of no avail and a license is required from the Federal Power Commission for a project constructed upon navigable waters of the United States prior to the enactment of the Federal Water Power Act of 1920, there can be no valid claim that a *proposed project*, to be located upon navigable waters of the United States, may be lawfully constructed, operated or maintained, as of this date, under a state permit or license.

When Congress acts with respect to navigable waters of the United States, or respecting any waters, the obstruction of which affects interstate or foreign commerce, what it does is not open to question. *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1. When Congress enacted the Federal Water Power Act of 1920, the limits of its control and regulation were made definitely clear and certain. When the provisions of Section 23(b) were expanded by Part II of the Holding Company Act of 1935, the intent of Congress was made equally clear and definite with respect to that enlarged area of control and regulation. Consequently, the Court below was obviously in error when it said:

"* * * considering only the two Sections upon which appellant and appellee have made the case to turn, Sections 7767 and 7771, we conclude that the area of law covered thereby is so obviously within the domain of the state's power that Congressional intention, to

supersede the disputed state laws, must much more clearly appear than it does in the Power Act." (R. 60)[7]

From and after the Commission's Finding of June 3, 1941, upon a declaration of intention filed pursuant to Section 23(b) of the Federal Power Act, that a license was required for petitioner's project, whatever authority existed in the State of Iowa to license or control power projects on the Cedar River in Iowa, a navigable water of the United States, was at an end. Chapter 363 of the Iowa Code was superseded and rendered inapplicable to power projects on the Cedar River. The purpose of Congress in enacting the Federal Water Power Act of 1920 was to unify control over hydroelectric power developments on navigable waters of the United States under a dominant federal authority.[8] It is true that the states and the federal government have legitimate functions within their own sovereignties and that because of our dual system of government, a contrariety of interests may at times arise. The possibility of a conflict of interests does not, however, justify the assertion by the Court below that "the Act contemplates a dual system of control and the exercise of appropriate powers

[7] Furthermore, the Court was in error in seeking to give effect to Sections 7767 and 7771 of Chapter 363 of the Iowa Code when those sections are but integral parts of the Chapter and have no individual standing. All sections of Chapter 363 are correlated with and tied to the permit requirements of Section 7771. Each Section, by its provisions, constitutes an obligation (1) which an applicant for a permit must satisfy, or (2) which a holder of a permit must observe. As a whole the various provisions make up the state water power act which is Chapter 363 of the Iowa Code.

[8] See Appendix, pp. 27, 43.
Representative LaFollette, a member of the Special Committee on Water Power, during the course of the debate on the bill on the floor of the House stated:

> "We are trying in this bill above everything else to overcome a divided authority and pass a bill that will make it possible to get development." 56 Cong. Rec. 9811.

by the State as well as by the Federal Government," if it is meant that Congress surrendered any part of its

[9] R. 57-58; see also to the same effect the Court's statements at R. 62, 65. 52, 53.

The Court below cites the following cases in its footnote 9 (R. 58): United States v. Appalachian Electric Power Co., 311 U. S. 377, 428-429; Alabama Power Co. v. Federal Power Commission, 75 U. S. App. 315, 320, 128 F. (2d) 280, 285; Safe Harbor Water Power Corporation v. Federal Power Commission, 3 Cir., 124 F. (2d) 800, 806-807. These cases provide no support for the claim that Congress delegated to the States, a part of its authority over navigable waters. Congress in Part I of the Federal Power Act sought to respect the rightful prerogatives of the States. It did no more. The legislative history of Section 9(b) of the Federal Water Power Act of 1920 makes that certain.

In its footnote 33 (R. 58), the Court below refers to *Jersey Central Power & Light Company* v. *Federal Power Commission*, 319 U. S. 61, 76, in support of the statement that the legislative history of the Federal Power Act indicated a purpose on the part of Congress to assist and strengthen State control and regulation rather than impair and diminish it. The *Jersey Central case* dealt with Parts II and III of the Federal Power Act enacted in 1935, more than 15 years after the enactment of Section 9(b) which was a part of the Federal Water Power Act of 1920, now Part I of the Federal Power Act. Likewise Parts II and III of the Federal Power Act were involved in *Connecticut Light and Power Co.* v. *Federal Power Commission*, 324 U. S. 515, (Footnote 31 to Opinion below). (R. 62)

Reference to the case of *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U. S. 591, 610 (Footnote 32) (R. 63), by the Court below provides no support for the reasoning of the Court. That case dealt with the Natural Gas Act of 1938. (c. 56, 52 Stat. 821; 15 U. S. C. 717 *et seq.*) Its provisions deal with the same matters of regulation concerning gas as Parts II and III of the Federal Power Act provides for electric power.

In its footnote 10 (R. 58), the Court below cites the following sections of the Federal Power Act; Section 4(e), 4(f), 7(a), 10(e), 14, 19, 20, 27, 16 U. S. C. A. §§ 797(e), 797(f), 800(a), 803(e), 807, 812, 813, 821. Nowhere in these sections is there the slightest indication that Congress intended or contemplated dual or divided control with respect to the exercise by it of its absolute power and authority over navigation and dominion over navigable waters. As to these, and the equally absolute right to issue licenses for the construction of power projects in such waters, Congress did not yield any part of its constitutional power or authority asserted in the Act. And it should be noted that the States themselves are as subject to the Power Act as any individual.

absolute jurisdiction over navigable waters of the United States. Section 23(b) clearly delineates the respective spheres of jurisdiction and control *in so far as licensing of power projects is concerned.* In this connection the meaning and effect of Sections 27 and 9(b) of the Federal Power Act is discussed in Part III of the argument *infra.*

II.

A Permit from the Executive Council of the State of Iowa, as Provided by Chapter 363 of the Iowa Code, Cannot be Required Under Section 9(b) of the Federal Power Act Since Congress by That Act Assumed Complete Dominion and Control Over Power Projects Located in Navigable Waters of the United States.

The Federal Power Commission, in dismissing petitioner's application for a license to construct a hydroelectric project upon the Cedar River in the State of Iowa, based its order of dismissal upon the following finding:

> "The applicant has not presented satisfactory evidence, pursuant to Section 9(b) of the Federal Power Act, of compliance with the requirements of applicable laws of the State of Iowa requiring a permit from the State Executive Council to effect the purposes of a license under the Federal Power Act, and the pending application, as supplemented, should be dismissed without prejudice." (R. 14).

The Court below in sustaining the action of the Commission said:

> "In any event, as the Power Act places upon petitioner the affirmative duty of showing compliance with state laws, it must assume their constitutionality, make its application for a permit and pursue such remedies as may be available in the state, to establish its right to issuance of the permit. Until it has done so, it is in no position to challenge an order of the Commission, which is based upon its failure to do so." (R. 48).

If, for the sake of argument, it is assumed that petitioner can and does obtain a permit under Chapter 363 of the Iowa Code, and as a consequence, a license is issued by the Federal Power Commission, which authority must petitioner thereafter obey? A state permit under Chapter 363 of the Iowa Code entails substantial obligations which petitioner must assume when it accepts the permit. Likewise a license from the Federal Power Commission imposes heavy burdens upon a licensee. The provisions of the Iowa Code and the requirements of the Federal Power Act deal in large part with the same subject matter, i.e., (1) construction, operation and maintenance of project works, (2) approval of plans and specifications, or changes therein, (3) the license period, (4) annual fees and charges, and (5) revocation of the license or permit. Truly the Federal Power Commission and the Court below ask petitioner to undertake the impossible. Petitioner cannot serve two masters. As Mr. Justice McLean said in writing the Court's decision in *The Passenger Cases*, 7 How. 283, at page 399:

> "A concurrent power in two distinct sovereignties to regulate the same thing is as inconsistent in principle as it is impractical in action. It involves a moral and physical impossibility."

When Section 9(b) was under consideration before the Power Committee of the House, an amendment was proposed which would have required that an applicant for a license submit satisfactory evidence that it has "*obtained the consent of the duly constituted authorities of the State or States within which the proposed project is to be located* • • • •" (Italics added.)

The amendment was rejected. During debate on the proposed amendment, Congressman Raker, in opposing the amendment, said:

> "Fundamentally, it [the amendment proposed] resolves itself into this, that the States might pass laws subsequent to the enactment of this legislation, and if this bill provided or required that the applicants should comply with the State laws, or rules and regulations

provided thereunder before he could operate under this bill, the whole scheme would be subject to the regulation and control, in effect, of the State, would it not?

* * * * *

"That really gets back to the fact that before he can proceed to obtain the benefits of this bill, which relates to the property of the Government, he must have complied with any and all laws, rules, and regulations provided by the State through its commission and other public functionaries, and therefore before the Government of the United States can grant him a license or a commission representing the Government of the United States, he must deal with another party first.

* * * * *

"That is what I am trying to get at. Congress having that power, [absolute power over navigable waters] should it waive it and make it possible by legislation that before any of this can be done, or before the licensee can get his license or the Commission have the power to issue it, he must have complied with any and all regulations provided by the State?

* * * * *

"Had we not better hold to what we have and not try to waive a fundamental right that is so necessary both on the public lands on the non-navigable streams as well as on the navigable streams?

* * * * *

"You might find this case: A party or association might have complied with all the provisions of the law save the one you referred to in your amendment. The commission would be justified in their view to give him a license, but he cannot comply with the State requirements and therefore because he is unable to comply with the State regulations, of necessity the commission cannot give him the license, and therefore you would, by your amendment, subordinate the Federal Government right to the right of the State, and the State would practically control because of a condition of that kind."[10]

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[10] Hearings before the Committee on Water Power, House of Rep., 65th Cong., 2d Sess., 1918, pp. 368-370. (Appendix hereto, pp. 22-24)

Petitioner is in the position described by Congressman Raker. The Federal Power Commission is ready to issue a license[11] but the requirement that Petitioner first secure a state permit subordinates the right of the federal government to the right of the State. The Federal Power Commission and the Court below seek to impose a condition which Section 9(b) does not justify.

It would seem that this Court made it clear in *United States* v. *Appalachian Power Company*, 311 U. S. 377, that the power and authority of Congress to license hydroelectric projects in navigable waters of the United States, as exercised through the provisions of the Federal Power Act, is absolute and exclusive.

In that case a dam was under construction upon the New River in the State of Virginia under a license from the State. The United States filed a bill in the United States District Court for an injunction against the construction or maintenance of the proposed dam, otherwise than under a license from the Federal Power Commission or, in the alternative, a mandatory order of removal. In reversing the District Court and the United States Court of Appeals for the Fourth Circuit, which denied the relief sought, the Supreme Court said at page 424:

> "The Federal Government has domination over the water power inherent in the flowing stream. It is liable to no one for its use or non-use. The flow of a navigable stream is in no sense private property; 'that the running water in a great navigable stream is capable of private ownership is inconceivable.' Exclusion of riparian owners from its benefits without compensation

[11] The Commission in the course of its opinion dismissing petitioner's application said:

> "The present plans call for a practical and reasonably adequate development to utilize the head and water available, create a large storage reservoir, and make available for recreational purposes a considerable area now unsuitable for such use, all at a cost which does not appear to be unreasonable." (R. 15)

is entirely within the Government's discretion. [United States v. Chandler-Dunbar Co., 229 U. S. 53, 66, 69, 76; cf. Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 330.]

"Possessing this plenary power to exclude structures from navigable waters and dominion over flowage and its product, energy, the United States may make the erection or maintenance of a structure in a navigable water dependent upon a license. [Greenleaf Lumber Co. v. Garrison, 237 U. S. 251, 268; United States v. Rio Grande Irrigation Co., 174 U. S. 690, 707.] *This power is exercised through § 9 of the Rivers and Harbors Act of 1899 prohibiting construction without congressional consent and through § 4 (e) of the present Power Act.*" (Italics supplied.)

This Court has repeatedly recognized the power and authority of Congress to exercise plenary and exclusive control over obstructions and improvements in navigable waters of the United States. Thus, in *United States* v. *Bellingham Bay Boom Co.*, 176 U. S. 211, the United States brought suit for an injunction to enjoin the defendant from further continuing a boom which it had constructed across the Nooksack River in the State of Washington. The boom was constructed prior to the enactment by Congress of the Rivers and Harbors Act of September 19, 1890 (26 Stat. 454, c. 907). Section 10 of that Act prohibited the creation, or continued maintenance, of any obstruction to the navigable capacity of any waters of which the United States had jurisdiction, "not affirmatively authorized by law." The Court found that Nooksack River was a navigable water of the United States and held that if the boom had been constructed in conformity with the requirements of state law, prior to the Rivers and Harbors Act of 1890, it was a *lawful structure*, since Congress prior to September 19, 1890 and at the time when the boom was constructed had not by any legislation asserted its authority over or taken into its own jurisdiction the subject of obstructions to the naviga-

tion of this river.[12] However, the Court makes it clear that the authority of a state over existing structures, or over proposed structures, in navigable waters of the United States, is at an end when Congress acts. At page 215-216 the Court said:

> "The power of Congress to pass laws for the regulation of the navigation of public rivers, and to prevent any and all obstructions therein, cannot be questioned. When Congress chooses to act, it is not concluded by anything that the states or that individuals by their authority or acquiescence have done, from assuming entire control of the matter, and abating any obstructions that may have been made, and preventing any others from being made except in conformity with such regulations as it may impose. The ultimate power of Congress over the whole subject is undoubted. This has been decided in numerous cases, and in the case of *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1, 31 L. ed. 629, 8 Sup. Ct. Rep. 811, many of them are referred to by Mr. Justice Bradley in delivering the opinion of the court. If, however, in exercising its right in regard to the regulation and control of commerce, private property must be taken, the government is obliged to make compensation to the owner. *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 336, 37 L. ed. 463, 471, 13 Sup. Ct. Rep. 622."

But the Attorney General of the State of Iowa in the "Motion of State of Iowa for Leave to Intervene" in the Court below said:

> "By reason of said provisions of law (Chapter 363, Iowa Code) and the diversion of water involved in the

[12] The Court said at page 215, "When Congress in 1890 passed the river and harbor bill we think the expression contained in § 10 in regard to obstruction 'not affirmatively authorized by law' meant, not only a law of Congress, but a law of the state in which the river was situated, which had been passed before Congress had itself legislated upon the subject." The corresponding section (§ 10) of the Rivers and Harbors Act of 1899 contains the words "not affirmatively authorized by Congress". Act of March 3, 1899, c. 425, § 10, 30 Stat. 1151, 16 U. S. C. § 403; cf. 16 U. S. C. A. § 403.

proposed project of petitioner, the executive council of the State of Iowa could not lawfully grant a permit for the erection of the dam proposed." (R. 40)

If Section 9(b) be construed to require that petitioner must secure a state permit from the Executive Council, as provided by Chapter 363 of the Iowa Code, in order to satisfy the requirements of Section 9(b) of the Federal Power Act, then the State of Iowa has an effective veto power over every license which the Federal Power Commission might otherwise issue—in direct contravention of the Federal Power Act itself and the avowed purpose and intent of Congress.

III.

Section 9(b) of the Federal Power Act Provides No Basis for the Claim That the States and the Federal Government are to Jointly Participate in the Issuance of Licenses for Power Projects Upon Navigable Waters of the United States.

The Court below was in error in holding, with respect to Section 9(b) of the Federal Power Act that "This section is the one which expresses the major intention of Congress that the States and the National Government shall participate jointly in the development and regulation of water power projects." (R. 65) The Court below, likewise, erred in holding that:

> "In enacting the Federal Power Act, it was not the intention of Congress that the Federal government should occupy the field completely, or that the states should be excluded. On the contrary, the Act contemplates a dual system of control and the exercise of appropriate powers by the State, as well as by the Federal government. This is the plain purpose of Section 9(b). It is revealed, also, by other sections of the Act."[13]

[13] See footnote 9, *ante*, wherein other sections of the Act are considered.

Section 23(b) delineates the circumstances and conditions under which a power project may be built "upon compliance with State laws" and when a license from the Federal Power Commission is required. There is no mention of any joint authority. There is none. Section 9(b) has no force or effect until application is made to the Federal Power Commission for a license. That section specifies certain conditions which must be met before a license may issue. It does not limit or modify Section 23(b) which clearly defines the separate areas of dominion and regulation, state and federal. The very words of Section 9(b) preclude an interpretation that the section was designed to provide joint state and federal action in any respect whatsoever.

The genesis of Section 9(b) is indicated by a consideration of the other subdivisions of Section 9 and by reference to the legislative history of the Section.[14] 9(a) refers to maps, plans, specifications and estimates of cost which may be required by the Commission. 9(c) requires that each applicant for a license submit such additional information as the Commission may require. Sections 9(a) and 9(c) are obviously designed to provide full information and data regarding a proposed project so that the Federal Power Commission will be fully advised regarding all aspects of the contemplated undertaking. Sub-section 9(b) is of like tenor.[15] To the extent that the laws of the state or states, in which the project is to be located, require affirmative

[14] See Appendix, pp. 39-43.

[15] Congressman Mondell emphasized that Section 9(b) was designed to provide information to the Federal Water Power Commission. In the course of his discussion regarding this section, he said:

> "There are two controlling reasons for the insertion of this paragraph. The first, from the standpoint of water-power legislation, is that the water-power commission shall have the benefit of all of the information which the States possess relative to the condition of water supply at the point of proposed diversion." (Appendix, p. 42)

action to secure or preempt rights required for the operation of a power project, an applicant must show that all such requirements have been met. It is principally in the western states that laws have been enacted dealing with "the appropriation, diversion and use of water" for beneficial purposes. In such states, water for the irrigation of arid lands, for mining and for power purposes, is of vital public interest. No appropriation of water can ripen into a vested water right until the procedure prescribed by state law has been satisfied and the water actually devoted to beneficial use.

The laws of some of these states go so far as to require that a stream be marked by appropriate notice in writing at the point where water is to be diverted; that within a specified time thereafter such notice be recorded among the land records of the county wherein the notice is posted; and, that construction of the works and improvements, required to reduce the proposed appropriation of water to beneficial purposes, be prosecuted diligently. Thus, in *Imperial Water Co. No. 5* v. *Holabird*, 197 Fed. 4, the United States Circuit Court of Appeals for the Ninth Circuit said at page 12:

> "Section 1415 [Civil Code of California] provides the method by which the water of a flowing stream may be appropriated. A person desiring to appropriate water must post a notice, in writing, in a conspicuous place at the point of intended diversion, stating therein: That he claims the water there flowing to the extent of (giving the number) inches, measured under a four-inch pressure; the purpose for which he claims it; the place of intended use; the means by which he intends to divert it; and the size of the flume, ditch, pipe or aqueduct in which he intends to divert it. It is provided further that a copy of the notice must, within 10 days after it is posted, be recorded in the office of the recorder of the county in which it is posted.
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> "Section 1416 requires diligence in the appropriation of water and provides that:

'Within sixty days after the notice is posted the claimant must commence the excavation or construction of the works in which he intends to divert the water or the survey road or trail-building necessarily incident thereto, and must prosecute the work diligently and uninterruptedly to completion.'

"Section 1417 provides that 'by completion' is meant conducting the water to the place of intended use."

Like provisions are to be found in the laws of the State of Oregon. In *Eastern Oregon Land Co.* v. *Willow River Land & Irrigation Co.*, 204 Fed. 516, various provisions of the Oregon law [Lord's Oregon Laws §§ 6525 et seq.] are set forth as follows:

"Section 4 of the act provides:

"When a point of diversion shall have been selected, such corporation shall post in a conspicuous place thereat a notice in writing containing a statement of the name of the ditch or canal or flume and of the owner thereof, the point at which its headgate is proposed to be constructed, a general description of the course of said ditch or canal or flume, the size of the ditch or canal or flume, in width and depth, the number of cubic inches of water by miner's measurement under a six-inch pressure intended to be appropriated, and the number of reservoirs, if any." (p. 532.)

"Section 5 of the act of 1891 required further that:

"Within ten days from the date of the posting of such notice [notice required by section 4] such corporation shall file for record in the office of the county clerk or recorder of conveyances, as the case may be, of the county in which said ditch or canal or flume, distributing ditches, reservoirs and feeders, are situated, a similar notice, and at the same time shall file a map showing the general route of said ditch or canal or flume. * * * *" (p. 533.)

"Section 7 of that act (Section 6595, Lord's Oregon Laws) provides:

"Where appropriations of water heretofore attempted have been undertaken in good faith, and the

> work of construction or improvement thereunder has been in good faith commenced and diligently prosecuted, such appropriations shall not be set aside or avoided, in proceedings under this act, because of any irregularity or insufficiency of the notice by law, or in the manner of posting, recording, or publication thereof." (p. 523.)

Satisfactory evidence of compliance with such requirements of state laws can be supplied to the Commission. Likewise, satisfactory evidence can be submitted to show that necessary authority has been obtained to engage in the business of generating, transmitting and distributing power as well as to engage in any other business necessary to effect the purposes of a license under the Federal Power Act.

Section 27 of the Federal Power Act provides:

> "That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective states relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses or any vested right acquired therein."

The principal public land bills of the United States are the Act of 1866,[16] the Act of 1877,[17] and the Act of 1902.[18] All of these laws contained a section similar to Section 27 of the present Federal Power Act. The state laws referred to therein are laws governing property rights; having particular application to the laws of the public land states in which the law of prior appropriation obtains.[19] These laws and rights acquired under them *are saved by Section 27* of the Federal Power Act from supersedure and from a future

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[16] Act of July 26, 1866, c. 262, 14 Stat. 253, 43 U. S. C. § 932.

[17] Desert Land Act of 1877, c. 107, 19 Stat. 377, 43 U. S. C. § 321.

[18] Act of June 17, 1902, c. 1093, § 8, 32 Stat. 390, 43 U. S. C. § 383.

[19] See Appendix, pp. 43-45.

taking of vested property rights *without compensation.*[20] They are not saved from the exercise by the United States, under the provisions of the Federal Power Act, of its absolute dominion over navigable waters of the United States. Section 9(b), on the other hand, requires satisfactory evidence by an applicant for a federal license of compliance with the requirements of state laws respecting bed and banks of streams and the appropriation, diversion, and use of water for power purposes, *prior* to the issuance of a license from the Federal Power Commission. No laws of a state, or vested property rights under such laws, are saved by virtue of Section 9(b). The section merely requires that an applicant for a federal license must show evidence of the acquisition by it of necessary rights required under state laws with respect to beds and banks and the appropriation, diversion and use of water for power purposes before the Federal Power Commission may issue a license for a power project.

Representative LaFollette, a member of the Special Committee on Water Power which reported the bill which became the Federal Water Power Act of 1920, stated in a speech in the House of Representatives:

> "If we make it one of the conditions precedent to the procuring of a license that the applicant has complied with the requirements of the State law as to bed, banks, diversion, and use of water, we are most assuredly not infringing any State's right in that respect, but are definitely *insisting the State's rules of property as to water, bed, and banks must have been fully complied with or the license cannot issue.*"[21]

During the debate on the bill, Representative LaFollette further stated:

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[20] Henry Ford and Son, Inc. v. Little Falls Fibre Co. et al., 280 U. S. 369; United States v. Central Stockholder's Corporation of Vallejo, et al., 52 F. 2d 322.

[21] Appendix, p. 27.

"In many States the law gives the riparian owner title to the middle of the stream. In other States only to the high-water mark. The property rights are within the State. It can dispose of the beds, or parts of them, regardless of the riparian ownership of the banks, if it desires to, and that has been done in some States. If we put in this language, which is practically taken from that Supreme Court decision, [the Cress Case] as to the property rights of the States *as to the bed and banks and to the diversion of the water*, then it is sure that we have not infringed any of the rights of the States in that respect, or any of their rules of property, and we are trying in this bill above everything else to overcome a divided authority and pass a bill that will make it possible to get developments. We are earnestly trying not to infringe the rights of the States. If possible we want a bill that cannot be defeated in the Supreme Court because of omissions, because of the lack of some provision that we should have put in the bill to safeguard the States."[22]

The wording of Section 9(b), the legislative history thereof, and a consideration of the absolute power of Congress over navigable waters of the United States under the Constitution as asserted in the acts of 1890,[23] 1899,[24] and 1920[25] and 1935,[26] demonstrate beyond question that Congress did not, and never intended to, share *with the States* its dominion over navigable waters of the United States or surrender any part of its constitutional authority to provide the absolute rule by which such waters are to be regulated and dams and obstructions therein controlled.

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[22] Appendix, pp. 28-29.

[23] Rivers and Harbors Act of 1890, c. 907, 26 Stat. 454.

[24] Rivers and Harbors Act of 1899, c. 425, 30 Stat. 1151, 33 U. S. C. §§ 401-403. See footnote 12, *ante*.

[25] Federal Water Power Act of 1920, c. 285, 41 Stat. 1063, 16 U. S. C. § 791.

[26] Federal Power Act, Act of June 10, 1920, c. 285, 41 Stat. 1063, 16 U. S. C. § 791, as amended by Act of August 26, 1935, c. 687, 49 Stat. 838, 16 U. S. C. § 791a.

The clear statement of Congressman Mondell when the bill, which became the Federal Water Power Act of 1920, was under consideration on the floor of the House, recounts the purpose and meaning of Section 9(b), and verifies our conclusions as to the intent of this section. In the course of his remarks, he said:

> "Mr. Chairman, I hope the amendment offered by the gentleman from California (Mr. Raker) will not prevail. I think the gentleman must have offered his amendment under a misapprehension of the meaning and effect of the language of the provision. [Section 9(b).] The gentleman is assuming that the language which he attempts to amend requires a completed water right and a water-right certificate before the party shall be granted a license under this act or his application be considered. That is not true at all. The provision is that the applicant shall have complied with the laws of the State with respect to the appropriation, diversion, or use of water; that is, he shall have complied with all of the laws of the State applicable to the situation up to the time he makes his application. As was suggested a moment ago when the amendment offered by the gentleman from New Jersey (Representative Parker) was under consideration, there are other requirements of State law that will apply after the license has been granted and construction begins, requirements that will continue on through the period of construction and through the period of operation. This provision has no reference to such requirements. It simply requires that the State laws shall be complied with so far as the applicant can comply with them in the nature of things up to the time he makes his application. Now, from the standpoint of the commission very great harm would come if the amendment the gentleman proposes should be adopted. *There are two controlling reasons for the insertion of this paragraph. The first*, from the standpoint of water-power legislation, *is that the water-power commission shall have the benefit of all of the information which the States posses relative to the condition of water supply at the point of proposed diversion.* That is a very important reason for a provision of this kind. * * * * *The second reason is so that*

the bill shall carry with it notice to the commission that they must proceed in accordance with the State laws, which they must do in any event, whether the provision were in the bill or not." (Italics supplied.)[27]

To construe Section 9(b), as the Federal Power Commission and the Court below would have it construed, violates not only the words of the individual section but the Act as a whole, its purpose and the intent of Congress.

Diligent search fails to disclose any state law relating to the bed and banks of streams, where affirmative action is required prior to a taking for a power project or other public improvement, or that ultimately more is required than to compensate the owner for what is taken. This may well be since the words *bed and banks* were inserted in Section 9(b), at the instance of Representative LaFollette, while the bill which became the Federal Water Power Act of 1920 was under consideration on the floor of the House.[28] Representative LaFollette gave as his reason for inserting the words "bed and banks" the fact that the Supreme Court of the United States, in numerous decisions recognized certain rights of the states to water flowing within their borders as well as property rights to the bed and banks of such streams. He made reference to a decision by Mr. Justice Pitney on May 12, 1917, and quoted the following from that decision:

> "The States have authority to establish for themselves such rules of property as they may deem expedient with respect to the streams of water within their borders, both navigable and non-navigable, and the ownership of the lands forming their beds and banks."

The language quoted is found in *United States* v. *Cress*, 243 U. S. 316, 319, and a consideration of the entire statement by Mr. Justice Pitney, of which that quoted above is

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[27] Cong. Rec. Vol. 56, Part 10, p. 9813, 65th Cong. 2d Sess. 1918.

[28] See Legislative history, Appendix hereto p. 28.

a part, clarifies in large part the meaning of the words "bed and banks" as they appear in Section 9(b).[29]

The import of the *Cress case* was that property rights must be respected, even by the United States, or just compensation paid for the property taken as guaranteed by the Fifth Amendment. Representative LaFollette made it plain that he was primarily concerned with *property rights*.

Thus, Section 9(b) merely requires that an applicant for a license show that it has taken all steps required by state law to establish its right to do the things which it proposes to do. There must be compliance with such laws whether evidence of compliance is submitted to the Commission or not.[30]

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[29] The full statement to which reference was made is as follows:

"The states have authority to establish for themselves such rules of property as they may deem expedient with respect to the streams of water within their borders, both navigable and non-navigable, and the ownership of the lands forming their beds and banks (*Barney* v. *Keokuk*, 94 U. S. 324, 338, 24 L. ed. 224, 228; *Packer v. Bird*, 137 U. S. 661, 671, 34 L. ed. 819, 821, 11 Sup. Ct. Rep. 210; *Hardin* v. *Jordan*, 140 U. S. 371, 382, 35 L. ed. 428, 433, 11 Sup. Ct. Rep. 808, 838; *Shively* v. *Bowlby*, 152 U. S. 1, 40, 58, 38 L. ed. 331, 346, 352, 14 Sup. Ct. Rep. 548; *St. Anthony Falls Water Power Co.* v. *Wster Comrs.*, 168 U. S. 349, 358, 42 L. ed. 497, 501, 18 Sup. Ct. Rep. 157), subject however, in the case of navigable streams, to the paramount authority of Congress to control the navigation so far as may be necessary for the regulation of commerce among the states and with foreign nations (*Shively* v. *Bowlby*, 152 U. S. 1, 40, 38 L. ed. 331, 346, 14 Sup. Ct. Rep. 548; *Gibson* v. *United States*, 166 U. S. 269, 272, 41 L. ed. 996, 1000, 17 Sup. Ct. Rep. 578; *Scott v. Lattig*, 227 U. S. 229, 243, 57 L. ed. 490, 496, 44 L. R. A. (N. S.) 107, 33 Sup. Ct. Rep. 242), the exercise of this authority being subject, in its turn, to the inhibition of the 5th Amendment against the taking of private property for public use without just compensation (*Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 336, 37 L. ed. 463, 471, 13 Sup. Ct. Rep. 622; *United States* v. *Lynah*, 188 U. S. 445, 465, 471, 47 L. ed. 539, 546, 549, 23 Sup. Ct. Rep. 349."

[30] The Court below entirely misconceived the intent and purpose of 9(b) when it said: "We cannot agree with the Commission's conclusion as to the effect of Section 9(b). This Section is the one which expresses the major intention of Congress that the

Section 27 is of an entirely different nature. It does save the State laws therein enumerated. Vested water and property rights under such laws must be respected and preserved or, if taken, compensation paid.

In this connection the decision of this Court in the case of *Henry Ford and Son, Inc.* v. *Little Falls Fibre Co., et al.*, 280 U. S. 369, shows the proper effect to be given to Section 27 of the Federal Power Act. In that case, Ford held a license from the Federal Power Commission permitting the installation of flash boards on a Government navigation dam in the Hudson River near Troy, New York. The flash boards on the dam raised the level of the pool upstream and materially reduced the head of water and the power developed at respondent's dam three miles up stream from the federal dam. The respondent, Little Falls Fibre Company, brought suit to recover damages and for an injunction restraining petitioner from maintaining flash boards on the crest of the federal dam. The case came to the Supreme Court on a writ of certiorari to review a decision of the Court of Appeals of New York awarding damages and granting the injunction prayed. In affirming the Court of Appeals this Court, after referring to Sections 6, 10, 21, and 27 of the Federal Power Act, said at pp. 378-379:

> "While these sections are consistent with the recognition that state laws affecting the distribution or use of water in navigable waters and the rights derived from those laws may be subordinate to the power of the national government to regulate commerce upon them, they nevertheless so restrict the operation of the entire act that the powers conferred by it on the Commission do not extend to the impairment of the operation of

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States and the National Government shall participate jointly in the development and regulation of water power projects. It just as effectively 'saves' state laws 'with respect to bed and banks [of streams] and [with respect] to the appropriation, diversion and use of water for power purposes' [fol. 63] as does Section 27 with respect to laws 'relating to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses.'" (R. 65)

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those laws or to the extinguishment of rights acquired under them *without remuneration*. We think the interest here asserted by the respondents, so far as the laws of the state are concerned, is a vested right acquired under those laws, and so is one expressly saved by section 27 from destruction or appropriation by licensees *without compensation*, and that it is one which petitioner, by acceptance of the license under the provisions of section 6, must be deemed to have agreed to recognize and protect. Whether section 21, giving to licensees the power of eminent domain, confers on them power to condemn rights such as those of respondents, and whether it might have been invoked by the petitioner in the present situation, are questions not before us." (Italics supplied)

The intervenor, the State of Iowa, contended in the Court below that the Supreme Court in *United States* v. *West Virginia*, 295 U. S. 472, interpreted Section 9(b) to mean that where state laws provide for a state license or permit, the satisfaction of such requirement is a prerequisite to the issuance of a license under the Federal Power Act. In that case the Court, after quoting Section 9(b), said at page 473:

> "The mere grant of the state license, *which the Federal Water Power Act makes prerequisite to the application for the federal license*, cannot be said to involve any infringement of the federal authority. It does not appear that the state has done more." (Italics supplied.)

What was said by way of comment concerning a point not in issue cannot control when that very point is presented for decision. *Cohens* v. *Virginia*, 6 Wheat. 264, 399; *McCormick Machine Co.* v. *Altman*, 169 U. S. 606, 611; *Union Tank Line Co.* v. *Wright*, 249 U. S. 275, 283-286. Moreover, the wording of the parenthetical statement indicates that it was made without reference to the requirement of the section. Section 9(b) provides for compliance with state laws as a prerequisite to the *issuance* of a license. The re-

quirement is not a prerequisite to an *application for a license* as the comment by the Court in the *West Virginia* case states.

In that case a private corporation obtained a state license and began the construction of a hydroelectric project upon the New River in West Virginia. The United States brought suit against the State of West Virginia and joined the corporation. The suit was to restrain the construction of the project which was nearing completion and to enjoin the State of West Virginia from asserting any right, superior or adverse, to that of the United States in connection with any dam or hydroelectric project on the New or Kanawha Rivers, as well as the production or sale of power from any such project. The State denied that the New River was a navigable water of the United States or that a license under the Federal Power Act was required. The Court found that the State of West Virginia had done no more than to authorize the project. The Court further found that control of navigation by the United States may be threatened by the imminent construction of a dam but not by permission to construct it. The ultimate finding of the Court was that there was no justiciable controversy between the United States and the State of West Virginia, and that the cause was not within the original jurisdiction of the Supreme Court of the United States.

It is thus seen that there was no issue concerning the interpretation of Section 9(b) and that there was no necessity or requirement that the Court pass upon, or interpret, the provisions of that section.

In this connection it should be noted that Section 23(b) of the Federal Water Power Act of 1920 did not then contain provisions making it mandatory that when a dam was to be constructed upon a non-navigable water of the United States, and before construction was begun, that a declaration of intention must be filed with the Federal Power Commission setting forth the details of the proposed project. Section 23(b), as it now stands, includes the amendments

provided by Part II of the Holding Company Act of 1935, Act of August 26, 1935, c. 687, Title II, § 210, 49 Stat. 846. Prior to such amendments, the filing of a declaration of intention to construct such a project was discretionary. Since the amendments of 1935, the filing of a declaration of intention, before beginning construction of a project in waters not defined as waters of the United States, is mandatory. Only when the Federal Power Commission, after investigation, finds that the proposed construction is not in navigable waters of the United States, that the interests of interstate and foreign commerce will not be affected, and that no public lands or reservations will be affected, may a project be constructed "upon compliance with state laws." Section 23(b) is now all inclusive. No power project may be constructed (1) upon navigable waters of the United States without a license from the Federal Power Commission, or (2) upon any other stream not defined as navigable waters of the United States, without filing a declaration of intention with the Federal Power Commission.

The *West Virginia case* differs materially from Petitioner's case because in the former case there had been no determination or finding that the New River, at the point where the project was being built, was a navigable water of the United States, or that the interests of interstate or foreign commerce would thereby be affected. On the other hand, the Federal Power Commission, by its Finding of June 3, 1941, found that the Cedar River in the State of Iowa is a navigable water of the United States, that the interests of interstate and foreign commerce will be affected by the construction proposed, that lands of the United States will be taken and flooded, and finally, that a license from the Federal Power Commission is required. With respect to the questions presented in the *West Virginia case*, the Court, at pages 473-474, said:

> "But there is presented here, as respects the state, no case of an actual or threatened interference with the authority of the United States. At most, the bill states

a difference of opinion between the officials of the two governments, whether the rivers are navigable and, consequently, whether there is power and authority in the federal government to control their navigation, and particularly to prevent or control the construction of the Hawks Nest dam, and hence whether a license of the Federal Power Commission is prerequisite to its construction. There is no support for the contention that the judicial power extends to the adjudication of such differences of opinion. Only when they become the subject of controversy in the constitutional sense are they susceptible of judicial determination. See Nashville, Chattanooga & St. Louis R. Co. v. Wallace, 288 U. S. 249, 259, 53 S. Ct. 345, 77 L. Ed. 730, 87 A.L.R. 1191. Until the right asserted is threatened with invasion by acts of the state, which serve both to define the controversy and to establish its existence in the judicial sense, there is no question presented which is justiciable by a federal court. See Fairchild v. Hughes, 258 U. S. 126, 129, 130, 42 S. Ct. 274, 66 L. Ed. 499; State ex rel. Texas v. Interstate Commerce Commission, 258 U. S. 158, 162, 42 S. Ct. 264, 66 L. Ed. 521; Com. of Massachusetts v. Mellon, supra, 262 U. S. 447, 483-485, 43 S. Ct. 597, 67 L. Ed. 1078; State of New Jersey v. Sargent, supra, 269 U. S. 328, 339, 340, 46 S. Ct. 122, 70 L. Ed. 289."

In the cause at bar the State of Iowa does assert jurisdiction over the proposed project and, in the Court below, contended that the project was prohibited by the laws of the State.[31]

The issues presented in the present case are the very issues which this Court said were not involved in the *West Virginia case*. The Court was not there called upon to determine the true import and real meaning of Section 9(b)

[31] See Motion of State of Iowa for Leave to Intervene where the Attorney General of the State says:

"By reason of said provisions of law [c. 363 Iowa Code] and the diversion of water involved in the proposed project of petitioner, the executive council of the State of Iowa could not lawfully grant a permit for the erection of the dam proposed." (R. 49)

of the Federal Power Act, or whether a state law had valid application when that law, as is contended by the State of Iowa, would in effect prohibit and prevent the construction within the state of a federal project under federal license until the state put its stamp of approval upon the project by the issuance of a state permit. To give to Section 9(b) the meaning indicated by the *dicta* in the *West Virginia* case would give to every state and territory full right and opportunity to prescribe the rule and specify the conditions controlling the construction of power projects upon navigable waters of the United States within the borders of such states or territories, and would likewise provide equal control over projects on other streams similarly situated which affect interstate or foreign commerce, and for which a license under the Federal Power Act is required under the provisions of Section 23(b).

Thus, the states and territories, instead of the Federal government, would have jurisdiction and control over power projects on navigable streams of the United States, power projects affecting the interests of interstate or foreign commerce, and power projects involving the use or taking of public lands of the United States. The states and territories could thus lay down the rules under which such projects might proceed. If Section 9(b) is to be given the construction for which the State of Iowa contends; the only limitation upon the State to impose other restrictive legislation is the limitation imposed by inclination. All other states and territories are in like position.

Petitioner respectfully submits that Section 9(b) is not open to a construction which would destroy the manifest purpose of the Act of which the Section is a part. The clear intent of the Federal Power Act is to the contrary. The purpose of Congress, as indicated by the Act itself and the legislative history of the regulation provided, indicates a determined intent to preserve and exercise full continuing control of navigable waters and improvements therein.

IV.

Petitioner is Under No Obligation to Comply With Section 7796 of Chapter 363 of the Iowa Code.

The Court below said:

> "Nothing appears in the record to excuse petitioner's failure to comply with Section 7796. For this reason alone, therefore, the Commission's order must stand." (R. 68)

Such a conclusion is completely illogical unless petitioner is required to make application to the State for a permit to construct the project proposed.

Section 7796 of Chapter 363 of the Iowa Code provides:

> "Whenever the erection of *any such dam* will affect highways or State-owned lands, the *applicant* shall as a *condition precedent* secure a permit from the Board, commission, or other official body charged with jurisdiction over and control of said highways or state-owned lands." (Italics supplied.)

This section plainly states that an applicant for a permit from the Executive Council of the State, (under Section 7767 and Section 7771) must, as a condition precedent, secure a permit from the state highway commission where highways are to be affected by the construction of a dam. The section is an integral part of Chapter 363 of the Code. In and of itself it has no standing. The Court below was clearly in error.

V.

The Court Below Erred in Holding That "The Commission, Properly, Insisted Upon a Good Faith Effort, by Its Applicant, to Comply with the State Law."

It is to be noted that the Court below, in making its ultimate and concluding determination that "The Commission, properly, insisted upon a good faith effort, by its applicant, to comply with the state law" (R. 72), did not say that a

state permit was required. The Court implies that the Commission must be satisfied, if Petitioner makes a "good faith effort * * * to comply with the State law."

On the other hand, the Court below, in the course of its opinion, makes the following statement:

> "In recognizing and safeguarding the concurrent interest of the states in hydroelectric developments, it was not the purpose of Congress to require their consent to the construction and operation of such projects, or to give, to the states, a veto power over them." (R. 66)
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Taking the two statements together, the Court seems to say that a State permit is required to comply with Section 9(b) if such a permit can be had; that in any event Petitioner is required to make a *good faith effort* to obtain a permit from the Executive Council of the State of Iowa as required by Chapter 363 of the Iowa Code; and that, if Petitioner fails, notwithstanding its *good faith effort* to obtain the required State permit, then Petitioner may be excused from compliance with the State law, if it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

The situation is further confused by other statements by the Court, relating to Chapter 363 of the Iowa Code and Section 9(b) of the Federal Power Act, which avoid the real issues of the case and seek to justify that avoidance. Typical of such statements are the following:

> "Petitioner's contention—upon the ground of unconstitutionality—depends also upon the assumption that the disputed Iowa Code Sections constitute an absolute bar to its project, hence that their effect is to defeat the jurisdiction of the Federal government and the purposes of the Power Act. This contention must be rejected, also. It is the duty of courts to avoid the issue of constitutionality if the statute which is being interpreted is susceptible of any reasonable interpretation consistent with constitutionality." (R. 58)
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> "* * * In any event, as the Power Act places upon petitioner the affirmative duty of showing compliance with state laws, it must assume their constitutionality, make its application for a permit and pursue such remedies as may be available in the state, to establish its right to issuance of the permit. Until it has done so, it is in no position to challenge an order of the Commission, which is based upon its failure to do so." (R. 50)

Petitioner is not seeking a construction of any State law. Petitioner is seeking a construction of Section 9(b), and related sections of the Federal Power Act. Questions presented are questions arising under the laws of the United States. Petitioner has a right to have these questions answered by a Federal court having jurisdiction and it should not be called upon to make a "good faith effort" to comply with a state law which it has challenged as not being a state law of the character and purport contemplated by Section 9(b) of the Federal Power Act.[32] The question is: What does Section 9(b) mean? The Court was required to consider state laws only in so far as they were necessarily and incidentally involved, in the construction and interpretation of an Act of Congress.

In *United States* v. *Bellingham Bay Boom Co.*, 176 U. S. 211, the Supreme Court of the United States held that a Federal question was presented when a Federal statute made compliance with a State law the measure of compliance with an Act of Congress. In the course of its decision, the Court said at pp. 217-218:

> "By the passage of the river and harbor bill, * * * * Congress had acted upon the subject, and has provided for the removal of any obstruction to a navigable river

[32] Petitioner's failure to apply for a permit under Chapter 363 of the Iowa Code is not a failure to exhaust an administrative remedy. Petitioner has pursued the administrative procedure prescribed by the Federal Power Act and the rules thereunder. The appeal to the Court below was strictly in accord with the procedure prescribed by Section 313(b) of the Federal Power Act.

with the exceptions named in the section. When the Attorney General, therefore, acts under the authority conferred by this statute, he has the right to call upon the court, upon proper proofs being made, to enjoin the continuance of any obstruction not authorized by the statute, and the court has jurisdiction, and it is its duty, to decide the question whether the existing obstruction is or is not affirmatively authorized by law. In such inquiry the court is bound to decide whether the boom as existing is authorized by any law of the state, when such law is claimed to be a justification for its creation or continuance. That question is not for the state alone, but must necessarily be decided by the Federal court in the course of exercising the jurisdiction conferred upon it by the Federal statute. We therefore cannot concur with the views of the circuit court of appeals upon this subject.

* * * * *

"If there were here no Federal law in existence, then the question whether the boom was authorized by a state law, or complied with its provisions, would be a state question, as is clearly set forth in the above extract. But the Federal law having been passed, the question then is whether the structure is permitted by that law, and when that law says it may continue, if affirmatively authorized by a state law, the question whether it is so authorized becomes in effect a question whether the Federal law does or does not permit it. If it is authorized by the state law, then the Federal law provides that it may continue; and whether it is or is not, becomes a question for the Federal court to decide."

Likewise, in the case at bar, compliance with certain state laws is made the measure of compliance with Section 9(b) of the Federal Power Act. Is Chapter 363 of the Iowa Code such a state law? The meaning of Section 9(b) is a Federal question. A Federal court, called upon to consider and determine that question may not avoid its obligation because incidentally it is called upon to consider, and possibly interpret, a state law subsidiary to the primary and dominant question before it. The Court below erred in not

definitely determining and stating the true meaning (1) of Section 9(b) of the Federal Power Act, and (2) whether Petitioner was under obligation to secure a permit from the Executive Council of the State of Iowa in order to comply with Section 9(b) and as a prerequisite to the issuance of a license by the Federal Power Commission.

That question remains unanswered. It is presented to this Court for decision.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed.

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February 6, 1946.

APPENDIX.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Commissioners

Claude L. Draper, Acting Chairman, John W. Scott and Clyde L. Seavey. Basil Manly and Leland Olds not participating.

June 3, 1941

Docket No. DI-154.

IN THE MATTER OF
FIRST IOWA HYDRO-ELECTRIC CO-OPERATIVE.

FINDING OF COMMISSION.

Upon declaration of intention filed January 29, 1940, pursuant to Section 23(b) of the Federal Power Act, by First Iowa Hydro-Electric Co-operative of Muscatine, Iowa, to construct a project on Cedar River, a tributary of the Iowa River, in Muscatine and Cedar Counties, Iowa; and

Upon supplemental declaration of Intention filed April 2, 1941, by the same cooperative to construct a different scheme of development at approximately the same site; and

It appearing to the Commission, after investigation of the proposed construction, consideration of the declaration of intention and supplement thereto, and all pertinent records, that:

(A) The declarant is a corporation organized and operating under the laws of the State of Iowa;

(B) The project as proposed both in the declaration of intention and supplement thereto will be located on the Cedar River near Moscow, Iowa, about 24 miles above its junction with the Iowa River, which latter stream flows into the Mississippi River at a point about 28 miles below the mouth of the Cedar River;

(C) Both the Cedar and Iowa Rivers at one time carried a portion of the produce and immigration of [illegible] Iowa, and steamboats made many trips with [illegible] regularity in this trade;

(D) Past actual use of the Cedar and Iowa Rivers for navigation over a period of years and in substantial volume establishes the susceptibility of these Rivers to navigation, notwithstanding present non-use;

(E) The project as proposed in the original declaration of intention was to consist of a dam on the Cedar River not more than 53 feet high, having an overall length of about 8,555 feet, composed of a non-overflow concrete gravity section, a concrete spillway section controlled by 16 Taintor gates, and an earth section; a power house integral with the dam, with proposed installation of three 5,000 kw. generating units, and a reservoir having a useful storage capacity of 72,000 acre-feet;

(F) The effect of operation of the project, as proposed in the original declaration of intention, would be to reduce the stage of the Iowa River at Wapello, a point about 34 miles below the project, by as much as 1 foot; and to reduce the stage of the Mississippi River at the mouth of the Iowa by 0.5 feet;

(G) The project as proposed in the declaration of intention as supplemented, will consist of the dam on the Cedar River; a diversion canal about 8 miles long from the reservoir on the Cedar River which will divert the water to the banks of the Mississippi River at Muscatine, Iowa; and instead of the power plant being constructed at the dam, it will be constructed on the west bank of the Mississippi River at Muscatine, and will have an initial installation of 50,000 kilowatts, with an ultimate installation of 100,000 kilowatts;

(H) The effect of operation of the project, as described in the declaration of intention as supplemented, on the flow of the Cedar and Iowa Rivers would be substantially the same as that which the original project would have caused, except that it would be more continuous and frequent;

(1) Apparently the diversion canal will be sufficient size to divert the entire flow of the Cedar River over long periods of low and moderate flow; and such diversion could lower the stage of the Iowa River by about 1.6 feet at Wapello, Iowa;

(2) The operation of the [illegible] would cause a discharge [illegible] river-diversion canal into the Iowa River [illegible] in the amount [illegible] for short periods; and [illegible] minimum flow in the Mississippi [illegible] approximately 7,000 c.f.s.

(3) Locks and [illegible] could be so operated as to give a substantial [illegible] for six continuous days and [illegible] a 24-hour period over Sundays [illegible] shut-down periods [illegible] about 12 miles from the [illegible] will be [illegible] ated;

(4) According to the records [illegible] two small islands [illegible] about [illegible] mile and [illegible] proposed project [illegible] Sec. 8, T. 78 N., R. 2 W., 5th Principal meridian, Iowa [illegible] Site Classification No. [illegible]

The Commission *finds* that:

(1) The Cedar and Iowa Rivers [illegible] of the United States;

(2) The diversion of water [illegible] to and use of the diversion canal [illegible] have a direct and substantial effect upon the flow and navigable capacity of the Iowa River [illegible] navigable capacity of that river;

The alternate withholding of water [illegible] and canal during periods of shut-down of the power plant and the release of water at substantial rates of

flow during periods of operation of the power plant, as set forth above, would cause extreme fluctuations in the flow of the Mississippi River at Muscatine, Iowa, and would substantially affect the navigable capacity of that river;

(4) The interests of interstate commerce would be affected by construction of the project as described in the declaration of intention as supplemented;

(5) The two small islands described in paragraph (d) above are public lands of the United States and will be partly or wholly flooded by the reservoir of the proposed project and will be occupied by the project;

(6) A license for the construction proposed above is required under the provisions of the Federal Power Act.

By the Commission.

LEON M. FUQUAY,
Secretary.

PERTINENT SECTIONS OF THE FEDERAL POWER ACT.

SEC. 4. [*As amended August 26, 1935.*] The Commission is hereby authorized and empowered—

* * * * * * * * *

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation: *Provided further*, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting navigation have been approved by the Chief of Engineers and the Secretary of War. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of im-

proving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: *Provided further*, That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further*, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection.

* * * * * * * * * *

SEC. 9. That each applicant for a license hereunder shall submit to the Commission—

(a) Such maps, plans, specifications, and estimates of cost as may be required for a full understanding of the proposed project. Such maps, plans, and specifications when approved by the commission shall be made a part of the license; and thereafter no change shall be made in said maps, plans, or specifications until such changes shall have been approved and made a part of such license by the commission.

(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act.

(e) Such additional information as the commission may require.

. . . . . .

SEC. 23(b) It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under, and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws.

. . . . . .

SEC. 27. That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

CHAPTER 363. IOWA CODE, 1939.

Mill Dams and Races.

7767 PROHIBITION—permit. No dam shall be constructed, maintained, or operated in this state in any navigable or meandered stream for any purpose, or in any other stream for manufacturing or power purposes, nor shall any water be taken from such streams for industrial purposes, unless a permit has been granted by the executive council to the person, firm, corporation, or municipality constructing, maintaining, or operating the same. (R60, §1264; C73, §1188; C97, §1921; C24, 27, 31, 35, §7767.)

7768 APPLICATION FOR PERMIT. Any person, firm, corporation, or municipality making application for a permit to construct, maintain, or operate a dam in any of the waters, including canals, raceways, and other constructions necessary or useful in connection with the development and utilization of the water or water power, shall file with the executive council a written application, which shall contain the following information:

1. The name of the navigable, meandered, or other stream in or across which a dam is maintained or it is proposed to construct a dam or other obstruction, and a description of the site for such dam, including the name or names of the riparian owners of the site.

2. The purpose for which the dam is maintained or for which it is proposed to maintain the same, including the use to which the water is to be put.

3. A general description of the dam, raceways, canals, and other constructions, including the specifications as to the material and plan of construction and a general description of all booms, piers, and other protection works which are constructed in connection therewith, or which it is proposed to erect in connection therewith.

4. The approximate amount of hydraulic power that the dam is capable of developing and the amount of power to be used.

5. A map or blue print on a scale of not less than four inches to the mile, showing the lands that are or may be affected by the construction, operation, or maintenance of the dam, and the ownership of each tract of land within the affected area.

6. Such additional information as may be required by the executive council (R60, §1265; C73, §§188, 1189; C97, §1921; C24, 27, 31, 35, §7768).

7769 Notice of Hearing. When any application for a permit to construct, maintain, or operate a dam from and after the passage of this chapter is received, the executive council shall fix a time for hearing, and it shall give notice of the time and place of such hearing by publication once each week for two successive weeks in at least one newspaper in each county in which riparian lands will be affected by the dam (R60, §§1266, 1270; C73, §1190; C97, §1922; C24, 27, 31, 35, §7769).

7770 Hearing. At the time fixed or such hearing or at any adjournment thereof, the council shall take evidence offered by the applicant and any other person either in support of or in opposition to the proposed construction. (R60, §§1267, 1268; C73, §§1192, 1193; C97, §§1924, 1925; C24, 27, 31, 35, §7770.)

7771 When Permit Granted. If it shall appear to the council that the construction, operation, or maintenance of the dam will not materially obstruct existing navigation, or materially affect other public rights, will not endanger life or public health, and any water taken from the stream in connection with the project is returned thereto at the nearest practicable place without being materially diminished in quantity or polluted or rendered deleterious to fish life, it shall grant the permit, upon such terms and conditions as it may prescribe. (R60, §1269; C73, §§1193, 1198; C97, §1930; C24, 27, 31, 35, §7771.)

7772 Certificate of Approval. No permit shall be granted for the construction or operation of a dam where the

water is to be used for manufacturing purposes, except to develop power, until a certificate of the state department of health has been filed with the council showing its approval of the use of the water for the purposes specified in the application. (C24, 27, 31, 35, §7772.)

7773 Application For Certificate. When it is proposed to use the water for manufacturing purposes, except to develop power, or for condensation purposes, application must be made to the department of health, accompanied by a description of the proposed use of the water and what, if any, substances are to be deposited in such water and chemical changes made in the same, and such other information as the department of health may require to enable it to determine the advisability of the issuance of such certificate. (C24, 27, 31, 35, §7773.)

7774 Granting or Refusing. If the department of health is satisfied that the use of the water in any such project will not cause pollution of the same or render it materially unwholesome or impure, or deleterious to fish life, it may issue a certificate, and if it is not so satisfied, it shall refuse to issue same. (C24, 27, 31, 35, §7774.)

7775 Permit Fee—annual license. Every person, firm, or corporation, excepting a municipality, to whom a permit is granted to construct or to maintain and operate a dam already constructed in or across any stream for the purpose herein specified, shall pay to the executive council a permit fee of one hundred dollars and shall pay an annual inspection and license fee, to be fixed by the executive council, on or before the first day of January, 1925, and annually thereafter, but in no case shall the annual inspection and license fee be less than twenty-five dollars. All fees shall be paid into the general fund of the state treasury.

The provisions of this section shall not apply to dams already constructed having less than twenty-five horsepower capacity. (C24, 27, 31, 35, §7775.)

7776 Construction and Operation. The executive council shall investigate methods of construction, reconstruction, operation, maintenance, and equipment of dams, so as to determine the best methods to conserve and protect as far as possible all public and riparian rights in the waters of the state and so as to protect the life, health, and property of the general public; and the method of construction, operation, maintenance, and equipment of any and all dams in such waters shall be subject to the approval of the executive council. (C24, 27, 31, 35, §7776.)

7777 Access to Works. Such council or any member, agent, or employee thereof shall at all times be accorded full access to all parts of any dam and its appurtenances being constructed, operated, or maintained in such waters. (C24, 27, 31, 35, §7777.)

7778 Duty to Enforce Statutes. It shall be the duty of the council to require that all existing statutes of the state, including the provisions of this chapter, with reference to the construction of dams, shall be enforced. (C24, 27, 31, 35, §7778.)

7779 Violations. The construction, maintenance, or operation of a dam for the purpose specified herein without a permit first being issued, as in this chapter provided, shall constitute a misdemeanor, and shall be punishable by a fine of not less than one hundred dollars nor more than five hundred dollars. (C24, 27, 31, 35, §7779.)

7780 Action to Collect Fees. If any dam is constructed, operated, or maintained without the provisions of this chapter having been first complied with, including the payment of the permit fee and the annual inspection and license fee, the permit fee and the inspection and license fee may be recovered in an action brought in the name of the state, and in addition to the recovery of the amount due, there shall be collected a penalty of one thousand dollars. (C24, 27, 31, 35, §7780.)

7781 UNLAWFUL COMBINATION—RECEIVERSHIP. If any dam for which a permit has been issued becomes owned, leased, trusteed, possessed, or controlled in such manner as to be controlled by any unlawful combination or trust, or forms the subject or part of the subject of any contract or agreement to limit the output of any hydraulic or hydro-electric power derived therefrom for the purpose of price fixing as to such output, the state may take possession thereof by receivership proceedings instituted by the council, and such proceedings shall be conducted for the purpose of disposing of said property for lawful use and the proceeds shall be turned over to the persons found by the court to be entitled thereto, after the payment of all expenses of the receivership. (C24, 27, 31, 35, §7781.)

7782. NUISANCE. If any dam is constructed, maintained or operated for any of the purposes specified herein, in waters of this state in violation of any of the provisions of this chapter or in violation of any provisions of the law, the state may, in addition to the remedies herein prescribed, have such dam abated as a nuisance. (C24, 27, 31, 35, §7782.)

7783 CONDEMNATION—PETITION. Any person, firm, corporation, or municipality owning land on one or both sides of a watercourse, desiring to construct or heighten any dam in such watercourse or to construct or enlarge a raceway, canal, or other construction necessary for the development or utilization of the water or water power for any of the purposes specified in this chapter therefrom for the purpose of propelling any mill or machinery or developing any power by the use of the water, and to whom a permit has been granted as in this chapter provided, may file in the office of the clerk of the district court of the county in which such dam is, or is to be erected or heightened, a petition designating himself as plaintiff and the owners of the land affected, or that will be affected, as defendants, and describing with reasonable certainty the locality where such dam is to be erected or improved, and also of the lands that will

be overflowed or otherwise affected thereby. (R60, §§1264, 1265, 1274; C73, §§1188, 1189; C97, §1921; C24, 27, 31, §7783.)

7784 PRECEPT FOR JURY—SERVICE. The clerk shall thereupon issue an order, with a copy of the petition attached, directed to the sheriff, commanding him to summon a jury of twelve disinterested electors of his county to meet on a day fixed therein, and upon the land described, which order, including the copy of the petition, shall be served on the defendants in the same manner and for the same length of time previous to the day fixed in the order as is required for the service of original notices. Where the owner of any land affected is a nonresident of the state, service shall be made of the notice by publication in a newspaper in the county once each week for three successive weeks. (R60, §1266; C73, §1190; C97, §1922; C24, 27, 31, 35, §7784.)

7785 GUARDIAN APPOINTED. When service is made upon a minor or insane person having no guardian, the clerk at the time of issuing the order shall, by indorsement made thereon, appoint a suitable person to make defense for him. (C73, §1190; C97, §1922; C24, 27, 31, 35, §7785.)

7786 LANDS IN DIFFERENT COUNTIES. If any of the lands are situated in a different county than that in which the petition is required to be filed, the proceedings shall apply thereto to the same extent as if such lands were situated in the county where it is filed. (R60, §1270; C73, §1191; C97, §1923; C24, 27, 31, 35, §7786.)

7787 OATH—ASSESSMENT OF DAMAGES—COSTS. The jury shall be sworn, impartially and to the best of their skill and judgment, to view the lands described in the petition, and ascertain and appraise the damages each of the defendants will sustain by reason of such lands being overflowed or otherwise injuriously affected by the dam or raceway or heightening or enlarging the same. They may, in addition to examining the premises, examine witnesses, and shall

determine the amount of damages to which each of the defendants are, in their judgment, entitled, by reason of the construction or improvement of the dam or raceway, and shall report their findings in writing, attaching the same to the order and returning it to the sheriff. All costs and fees in connection with the assessment of damages under this chapter shall be the same as in condemnation cases and shall be paid by the plaintiff. (R60, §§1267, 1273; C73, §§1192, 1193, 1203; C97, §§1924, 1925, 1935; C24, 27, 31, 35, §7787.)

7788 APPEAL. Either party may appeal from such assessment to the district court within thirty days after the assessment is made and such appeal and all further proceedings in connection with such matter, whether as to an appeal or the payment of damages and costs, and all other matters connected with the proceedings, shall be the same as provided by law for assessment of damages in taking property for works of internal improvement. (C73, §1194; C97, §1926; C24, 27, 31, 35, §7788.)

7789 PROTECTION OF BANKS. Where the water backed up by any dam belonging to any mill or machinery is about to break through or over the banks of the stream or raceway, or to wash a channel, so as to turn the water of such stream or raceway, or any part thereof, out of its ordinary channel, whereby such mill or machinery will be materially injured or affected, the owner or occupant of such mill or machinery, if he does not own such banks or the land lying contiguous thereto, may, if necessary, enter thereon and erect and keep in repair such embankments and other works as may be necessary to prevent such water from breaking through or over the banks, or washing a channel as aforesaid; such owner or occupier committing thereon no unnecessary waste or damage, and being liable to pay all damages which the owner of the lands may actually sustain by reason thereof. (R60, §§1275, 1276; C73, §1204; C97, §1936; C24, 27, 31, 35, §7789.)

7790 Embankments—Damages. If any person shall injure, destroy, or remove any such embankment or other works, the owner or occupier of such mill or machinery may recover of such person all damages he may sustain by reason thereof. (R60, §1277; C73, §1205; C97, §1937; C24, 27, 31, 35, §7790.)

7791 Right to Utilize Fall. Any person owning and using a water power for the purpose of propelling machinery shall have the right to acquire, maintain, and utilize the fall below such power for the purpose of improving the same, in like manner and to the same extent as provided in this chapter for the erection or heightening of mill dams. After such right has been acquired, the fall shall be considered part and parcel of said water power or privilege, and the deepening or excavating of the stream, tail, or raceway, as herein contemplated, shall in no way affect any rights relating to such water power acquired by the owner thereof prior to such change. (C73, §1206; C97, §1938; C24, 27, 31, 35, §7791.)

7792 Revocation or Forfeiture of Permit. If the person to whom a permit is issued under the provisions of this chapter does not begin the construction or the improvement of the dam or raceway within one year from the date of the granting of the permit, his permit may be revoked by the executive council, and if any permit holder does not finish and have in operation the plant for which the dam is constructed within three years after the granting of the permit, unless for good cause shown the council has extended the time for completion, such permit shall be forfeited. (R60, §1269; C73, §1199; C97, §1931; C24, 27, 31, 35, §7792.)

7793 Legislative Control. No permit granted or rights acquired hereunder shall be perpetual, but they shall be subject to restriction, cancellation, and regulation by legislative action, and subject to all the provisions of this chapter. (C24, 27, 31, 35, §7793.)

7794 PENDING APPLICATIONS. All applications for a permit to construct a dam pending in the district courts of this state at the time of the passage of this chapter shall be heard and determined by the district court of the county in which same is pending under the laws of Iowa at the time of the making of the application to the district court, and where a permit has, prior to the passage of this chapter, been granted by the district court of any county, the applicant shall, in addition to the making of the application in the form provided in section 7768, file a transcript of the proceedings of the district court granting the said permit with said application, and thereupon a permit shall be issued to the applicant without further proceedings, upon payment of the required fees. (C24, 27, 31, 35, §7794.)

7795 PERMITS FOR EXISTING DAMS. The owner of a dam existing at the time of the taking effect of this chapter shall make application for a permit, which application shall be accompanied by such proofs and data as may be required by the executive council. Upon receipt of such application with proofs and data and payment of fees as required, the executive council shall grant a permit for the maintenance and operation of said dam as a matter of course. The owner of such dam shall, however, be subject to all of the regulatory provisions of this chapter. (C24, 27, 31, 35, §7795.)

7796 STATE LANDS. Whenever the erection of any such dam will affect highways or state-owned lands, the applicant shall as a condition precedent secure a permit from the board, commission, or other official body charged with jurisdiction over and control of said highways or state-owned lands. (C. 24, 27, 31, 35, §7796.)

7796.1 CITIES AND TOWNS. Cities and towns shall have the authority and power, by complying with the provisions of this chapter and the statutes relating to municipalities to construct dams for recreational purposes and to acquire lands that may be necessary in the construction thereof, which may be obtained by condemnation or otherwise. (C27, 31, 35, §7796-b1.)

EXCERPTS FROM MASTER'S THESIS OF ROY BAKER SNAPP SUBMITTED TO GEORGETOWN UNIVERSITY.

b. *Water Power Legislation 1917-1920*

In 1917 a bill, S. 1419, providing comprehensive legislation for the development of water power on the *navigable streams* of the United States was introduced in the Senate. This bill was the genesis of the Federal Water Power Act. The only provision in S. 1419 similar to Section 9(b) of the Federal Water Power Act was one which provided:

> "* * * * * before the permit shall be granted under this act, the permittee must first obtain, in such manner as may be required by the laws of the States, the consent of the State or States in which the dam or other structure for the development of water power is proposed to be constructed."

The above provision, calling for "consent" of a State to erect a project, is a marked contrast to the ultimate wording of Section 9(b). S. 1419 was passed by the Senate and was referred in the House to the Committee on Interstate and Foreign Commerce which had jurisdiction over navigable streams. Before the House committee could act on the proposed measure, however, President Wilson's intervention resulted in the House striking out everything but the enacting clause of S. 1419 and substituting an entirely new bill.

According to Representative Sims,[17] President Wilson early in 1918 requested the members of the House Committees on Public Lands, Agriculture, Interstate and Foreign Commerce, and Rules to confer with him at the White House. At that meeting the President stated that he had requested the Secretary of War whose department had jurisdiction over navigable rivers, the Secretary of the Interior whose department had jurisdiction over public lands, and the Secretary of Agriculture whose department

[17] Cong. Rec., 65th Cong., 2nd Sess., pp. 9797-99.

had jurisdiction over forest preserves, to prepare a *single bill*[18] *which would be comprehensive enough to cover water power on all sites over which the federal government had jurisdiction.* After summarizing the fundamental principles of the bill, the President asked the members of the committees present if they would object to having a "special committee created composed of an equal number of members of those legislative committees to consider the bill * * * and he asked the Committee on Rules * * * to advise whether or not a rule could be secured or could be formulated that would accomplish this purpose." In reply, Representative Sims indicated that his committee might be reluctant to amalgamate its power over navigable rivers with other committees and Mr. Pou of the Rules Committee said that such a committee could be established, but that the House might be reluctant to do so because such a proposition was new and might be considered as establishing a precedent.

The request of the president, was acceded to by the House, however, and on January 16, 1918, a "Special Committee on Water Power" was appointed.[19] The committee held hearings on the proposed legislation from March 18 to May 15, 1918, obtaining testimony and exhibits totaling almost 900 pages.—[20]

In theory the Special Committee on Water Power conducted hearings on S. 1419. In reality hearings were held on President Wilson's proposed substitute for that bill—

[18] Introduced as H. R. 8716, 65th Cong., 2nd Sess.

[19] Thetus W. Sims, Tenn., Chr. — Carl Hayden, Ariz.
Scott Ferris, Okla. — John J. Esch, Wis.
Asbury F. Lever, S. C. — Irvine L. Lenroot, Wis.
Frank E. Doremus, Mich. — Gilbert N. Haugen, Iowa
Edward T. Taylor, Colo. — Edward L. Hamilton, Mich.
Gordon Lee, Ga. — Wm. L. LaFollette, Wash.
Dan V. Stephens, Nebr. — James C. McLaughlin, Mich.
John E. Raker, Calif. — Richard Wayne Parker, N. J.
Ezekiel S. Candler, Miss. — Sidney Anderson, Minn.

[20] Hearings Before the Committee on Water-Power, House of Rep., 65th Congress, 2nd Sess., 1918.

H. R. 8716. The proposed substitute contained a Section 9(b) which provided that an applicant for a license should submit to the proposed commission:

> "Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power and in any other business necessary to effect the purposes of a license under this Act."

With the exception of one slight modification regarding the bed and banks of streams inserted by Representative LaFollette, this Section was ultimately to become also Section 9(b) of the Federal Water Power Act.

The first witness called before the special committee was Mr. Merill[21] of the Department of Agriculture who, as the Chairman indicated, "assisted in the preparation of the bill."[22] After an introductory statement emphasizing the national necessity of water power legislation,[23] Mr. Merill read and explained each section of the proposed substitute for S. 1419. His statement regarding Section 9(b) of the substitute bill was:

> "Section 9 of the bill * * * provides that (an applicant) shall present satisfactory evidence of compliance with the requirements of the laws of the State or States within which the proposed project is to be located, showing that the applicant has made application for such rights as the State required him to get before he can do business. That would cover applications for water rights, for example."[24]

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[21] Subsequently, the first Executive Secretary of the Federal Power Commission.

[22] Hearings Before the Committee on Water Power, House of Rep., 65th Cong. 2d Sess. 1918, p. 8.

[23] *Ibid.*, p. 20.

[24] *Ibid.*, p. 62.

Not a member of the Committee questioned Mr. Merill about the meaning of this section.

The first real illumination shed on Section 9(b) during the testimony before the House Committee was when a Mr. Houghton of New York proposed the section should read as follows:

> "Satisfactory evidence that the applicant has obtained the consent of the duly constituted authorities of the State or States within which the proposed project is to be located and has complied with the requirements of such State or States with respect to application for the right to appropriate, divert, and use water for power purposes, and for the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purpose of a license under this act." [25]

In the subsequent conversation between Representative Raker (one of the more zealous advocates of irrigation rights in the House) and Mr. Houghton, Representative Raker summarizes so succinctly the general attitude expressed by members of the Special Committee throughout the hearing and during the debate in the House, that the discourse is quoted at length.[26]

> "Mr. RAKER. Referring to your suggested amendments * * *, they would practically change the real fundamental principles of this bill, would they not?
>
> "Mr. HOUGHTON. I think not. What I was trying to have inserted here was this, that before a person applies he has to show the Federal Power Commission that he has complied with the laws of the State and has received proper authority from the proper officials, and in that sense it has changed the bill, because you say that each applicant shall submit, and I say that before he makes application he shall have obtained the consent of the duly constituted authorities of the State or States.

[25] *Ibid.*, p. 364

[26] *Ibid.*, pp. 368-370.

"Mr. RAKER. Fundamentally, it resolves itself into this, that the States might pass laws subsequent to the enactment of this legislation, and if this bill provided or required that the applicants should comply with the State laws, or rules and regulations provided thereunder, before he could operate under this bill, the whole scheme would be subject to the regulation and control, in effect, of the State, would it not?

"Mr. HOUGHTON. I think after he got his power he would be subject, because it provides in here—

"Mr. RAKER. (interposing). But you make this a fundamental prerequisite, that he must have complied with all the rules and regulations in regard to doing the same thing; formulated by the State authorities before he can even come to the Federal commission and become an operator or a licensee under the provisions of this bill.

"Mr. HOUGHTON. I do not think it is quite that, Mr. Raker, because you provide here in Section 9 that each applicant shall submit to the commission certain things. It virtually follows, that until he does do that the Federal Power Commission will not issue him a permit. I want to make sure that the permit will not be issued until he has complied with the requirements in the various States as they may exist at the time he makes his application.

"Mr. RAKER. That really gets back to the fact that before he can proceed to obtain the benefits of this bill, which relates to the property of the Government, he must have complied with any and all laws, rules, and regulations provided by the State through its commission and other public functionaries, and therefore before the Government of the United States can grant him a license or a commission representing the Government of the United States, he must deal with another party first.

"Mr. HOUGHTON. You said public property of the Federal Government. I have confined my remarks entirely to New York State. There are no public lands in New York State, and the only right the Federal Government has, if any, is under the commerce clause as to navigation.

"Mr. RAKER. That is quite considerable under this bill.

"Mr. HOUGHTON. It certainly is, and under the decisions it is very broad. What Congress considers as necessary for navigation is final; there is no review. Here you are seeking in the State of New York to take what the Federal Constitution grants to the citizens of New York; that is, the right to possess their own property for their purposes. It should not be taken from them without just compensation. But here you provide that anybody can go in if the Federal Government thinks it is necessary to regulate or improve navigation and take what belongs to the people of the State. The provisions of this bill might very properly apply to developments in those States where the Federal Government has a large amount of public lands, where a great many of the navigable streams are on the public lands.

"Mr. RAKER. Then, would you not by such legislation be authorizing the Government, whenever these rights in the navigable streams give water power to the States, and allow it to legislate on that subject—would you not really make its legislation subordinate to what the State might determine, not only upon navigable streams but particularly on the nonnavigable streams and on public lands.

"Mr. HOUGHTON. It might work out that way possibly, but it seems to me there should be some protection to the State and its interest because you say navigable and nonnavigable streams. There is no telling when navigable streams will be affected by storage impounding of water on nonnavigable streams, and Congress has absolute power to regulate that.

"Mr. RAKER. That is what I am trying to get at. Congress having that power, should it waive it and make it possible by legislation that before any of this can be done, or before the licensee can get his license or the commission have the power to issue it, he must have complied with any and all regulations provided by the State?

"Mr. HOUGHTON. My suggestions were made with the view of possibly avoiding friction between the two Governments.

"Mr. RAKER. Had we not better hold to what we have and not try to waive a fundamental right that is

so necessary both on the public lands on the non-navigable streams as well as on the navigable streams.'

"Mr. HOUGHTON. I do not agree with you that this suggested amendment waives anything which the bill seems to give to the Federal commission. It simply changes the order of things and it does not add any additional requirements. You say the applicant has to give satisfactory evidence that he has complied with the requirements. I simply say that before he can get the permit he shall show that, so that there will be no question about it. He might get a license and say he had made application to the State government and say he is going to meet their requirements, but he may never go through with it. This is to protect the State. I am trying to save the State.

"Mr. RAKER. You might find this case: A party or association might have complied with all the provisions of the law save the one you referred to in your amendment. The commission would be justified in their view to give him a license, but he cannot comply with the State requirements, and therefore because he is unable to comply with the State regulations, of necessity the commission cannot give him the license, and therefore you would, by your amendment, subordinate the Federal Government right to the right of the State, and the State would practically control because of a condition of that kind.

"Mr. HOUGHTON. It says you shall submit satisfactory evidence. That is mandatory. From that point of view, how are you subordinating the powers of the Federal Government, with the bill worded as I have suggested wording it, considering how it is not worded? You say he shall submit satisfactory evidence. That means he has to comply with that condition before he submits his application. I do not see the difference. I am making it stronger to see that he has complied with State laws."

The conversation terminated abruptly here when Representative ESCH interposed a question.

It is evident from the foregoing that in the opinion of Representative Raker compliance with Section 9(b) was

declaratory as to policy, not a condition precedent to the issuance of a license by the proposed power commission. Obviously, Mr. Raker did not believe that the licensing power, provided for by the act, the very heart of the bill, was to be subject to the laws of the forty-eight states.

It is interesting to note, however, that instead of *satisfactory evidence* that the applicant has complied with the laws of the State or States in which the project is to be located, Mr. Houghton proposed that the applicant secure the *consent* of the duly constituted authorities of the State. S. 1419 as it passed the Senate required that "the permittee must first obtain * * * the *consent* of the State or States * * *" (italics supplied). In other words Mr. Houghton was asking the House Committee to return to the wording of the section as it passed the Senate. Not only did the House Committee refuse to do so, but the Senate acceded to the new wording of the Section.

Another witness, Representative Mondell testifying before the committee and in behalf of national water power legislation said:

> "This act should contain—and I suppose there will be no opposition to that on the part of anyone, as a somewhat similar provision was contained in the Ferris House bill; as exactly the same provision is in the reclamation law, and as the principle has been generally accepted and approved—some such provision as this: 'That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State relating to the control, appropriation, use, or distribution of water.' That is the language, if I recall it rightly, of the reclamation of law, and I think in substance the provision contained in the Ferris bill. That is simply a statement of facts. It is not a new law. It is simply recognition of the situation as a guide to administrative officers who sometimes forget very basic and fundamental things. They get views and theories that lead them far afield. Some people have suggested—I do not know whether that has been suggested before this committee—that the Supreme Court decision in the Utah case—if that is the

> term used in connection with that case—in some way raises the question as to the complete control by the States of the waters within their borders, particularly the arid States. I do not think there is a line or a word or a suggestion in that decision that raises any question of that sort * * *"[27]

Representative Mondell's reference to the Reclamation Act[28] and the Ferris Bill[29] was correct in that both provide "That nothing in this Act shall be construed as affecting or intended to effect or to in any way interfere with the laws of any State * * * relating to the control, appropriation, use, or distribution of water * * *." It must be noted, however, that this proposed language appears in Section 27 of the Federal Water Power Act, not in Section 9(b).[30] It is noteworthy that Representative Mondell indicated that his interpretation of Supreme Court decisions was that the States under the Constitution had complete control of the non-navigable "waters within their borders," and that he referred to his proposal as a "guide to administrative officers" and as a recognition of existing constitutional law.

Outside of these two discussions over Section 9(b) of the substitute bill, none of the other witnesses before the Special Water Power Committee offered any suggestions. The only other suggestions made were minor in nature and were proposed to protect the water rights of the Western States.[31]

The Special Committee did not agree to the proposed alterations in Section 9(b) of the substitute bill and reported the measure without modification in that section.

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[27] *Ibid.*, 620.

[28] 32 Stat. L. 388, Ch. 1093 (June 17, 1902).

[29] H. R. 16673, 63 Cong. 3rd Sess.

[30] Section 27 provides, "That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

[31] Note 22, *supra*, p. 299 and p. 474.

After S. 1419 was reported out of the Committee, Representative LaFollette made a short speech [32] in the House praising the proposal and pointing out, in particular, that it did not usurp any of the powers of the various states. Mr. LaFollette explained that.

> "This bill is brought here because it is apparent that we can get no development under a divided authority, and development is needed. * * * under the proposed law the would-be licensee is supposed to have procured all concessions and necessary powers of the State or States in which the proposed project is situated before a license can be issued, thus harmonizing State and Federal interests, making development possible without either transgressing the sovereign powers of the States or conferring on the Federal Government any plenary power not contemplated by the Constitution. Under this bill we only allow the commission a supervisory power over those functions entirely within the State's jurisdiction for the period covered by any license, the State having exercised its rights in advance of issue."

In the same speech, Mr. LaFollette also indicated that he thought that the "legislation will prove to be sound in principle and sane in provisions as it comes from the committee, and, what is of transcendent importance, it will, with possibly one or two changes, *stand the test as to constitutionality*" (italics supplied). The "changes" to which Mr. LaFollette referred were his proposal to add "bed and banks" to the list of items with which an applicant for a license would "comply." He believed that.

> "If we make it one of the conditions precedent to the procuring of a license that the applicant has complied with the requirements of the State law as to bed, banks, diversion, and use of water, we are most assuredly not infringing any State's right in that respect, but are definitely insisting that the State's rules of property as to water, bed, and banks must have been fully complied with or license can not issue."

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[32] Cong. Rec. Vol. 56, part 9, p. 9108, 65 Cong. 2d Sess.

When debate on the bill began, Representative LaFollette was the first to speak after the Clerk read Section 9(b) of the proposed act. His earlier expression of concern as to the constitutionality of the bill was demonstrated by his proposing to amend Section 9(b) as follows (Mr. LaFollette's proposed addition in italics):[33]

> "(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to the *bed and banks and* to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purpose of a license under this act."

Mr. LaFollette gave the following reasons for proposing the amendment:[34]

> "Mr. Chairman, in this section, by the provision that the applicant for a license shall have complied with the rules and laws of the State in regard to the diversion of water, we are trying not to infringe the rights of the States in that respect, and I wish to call the attention of the committee to the fact that many Supreme Court decisions in respect to States' rights as to water also refer to States' rights as to the beds and banks, and I would like to read from the latest United States Supreme Court decision upon this question, delivered on May 12, 1917. The opinion was delivered by Mr. Justice Pitney, and in that he says:
>
> 'The States have authority to establish for themselves such rules of property as they may deem expedient with respect to the streams of water within their borders, both navigable and nonnavigable, and the ownership of the lands forming their beds and banks.'
>
> "In many States the law gives the riparian owner

[33] *Ibid.*, p. 9109.

[34] *Ibid.*, p. 9110.

title to the middle of the stream. In other States only to the high-water mark. The property rights are within the State. It can dispose of the beds, or parts of them, regardless of the riparian ownership of the banks, if it desires to, and that has been done in some States. If we put in this language, which is practically taken from that Supreme Court decision, as to the property rights of the States as to the bed and banks and to the diversion of the water, then it is sure that we have not infringed any of the rights of the States in that respect, or any of their rules of property, and we are trying in this bill above everything else to overcome a divided authority and pass a bill that will make it possible to get developments. We are earnestly trying not to infringe the rights of the States. If possible we want a bill that can not be defeated in the Supreme Court because of omissions, because of the lack of some provision that we should have put in the bill to safeguard the States."

Thus, according to Mr. LaFollette, a member of the Special Committee on Water Power, the *purpose of Section 9(b) was to avoid infringing on the rights of the states and thusly to prevent questions of constitutionality from invalidating the proposed act.* The amendment was acceded to by the House.

The next amendment to Section 9(b), offered by Representative Parker of New Jersey, was to permit an applicant to provide the Commission with satisfactory evidence that he "will comply" with laws of the State, rather than that he "has complied" with such laws.[35] During the debate on the proposed amendment, Representative Mondell said that he undersfood Section 9(b) merely to require "a certain applicant shall do certain things, shall comply with certain regulations and certain laws, and *all applicants can do that*" (italics supplied). This amendment failed.

The only other amendment of importance was offered by Representative Raker of California, who proposed that an applicant should provide satisfactory evidence that he

[35] Cong. Rec., Vol. 56, part 10, p. 9811.

had complied with the requirements of the law of the State or States in which the proposed project was to be located, "with respect to application for the right to appropriate, divert, and use."[36] Representative Raker was concerned because most state laws provide that even after an application for water rights is filed, no right can attach until an actual appropriation has been made. Such actual appropriation must by the nature of things be accompanied by substantial expenditures of funds in any case in which the appropriation is important quantitatively. Mr. Raker thought that the proposed commission might require an applicant to obtain a completed water right and he was afraid that after large expenditures an applicant might find himself refused a permit by the proposed commission.

Representative Mondell who, as noted earlier, testified in behalf of the bill, differed from Representative Rankin as to necessity and propriety of his amendment. During the debate on Representative Raker's amendment, Representative Mondell explained his interpretation of the proposed Section 9(b) as follows (italics supplied):[37]

> "Mr. Chairman, I hope the amendment offered by the gentleman from California (Mr. Raker) will not prevail. I think the gentleman must have offered his amendment under a misapprehension of the meaning and effect of the language of the provision. The gentleman is assuming that the language which he attempts to amend requires a completed water right and a water-right certificate before the party shall be granted a license under this act or his application be considered. That is not true at all. The provision is that the applicant shall have complied with the laws of the State with respect to the appropriation, diversion, or use of water; that is, he shall have complied with all of the laws of the State applicable to the situation up to the time he makes his application. As was suggested a moment ago when the amendment offered by the gentleman from New Jersey (Representative Parker) was

[36] Cong. Rec., Vol. 56, part 10, p. 9812.
[37] *Ibid.*

under consideration, there are other requirements of State law that will apply after the license has been granted and construction begins, requirements that will continue on through the period of construction and through the period of operation. This provision has no reference to such requirements. It simply requires that the State laws shall be complied with so far as the applicant can comply with them in the nature of things up to the time he makes his application. Now, from the standpoint of the commission very great harm would come if the amendment the gentleman proposes should be adopted. *There are two controlling reasons for the insertion of this paragraph. The first,* from the standpoint of water-power legislation, *is that the water-power commission shall have the benefit of all of the information which the States possess relative to the condition of water supply at the point of proposed diversion.* That is a very important reason for a provision of this kind. * * * *The second reason is so that the bill shall carry with it notice to the commission that they must proceed in accordance with the State laws, which they must do in any event, whether the provision were in the bill or not.*"

Mr. Mondell's explanations were consonant with other statements about Section 9(b) made during the debate, i.e., the section was for the guidance of the commission and that it was intended to be a restatement of the existing law on the subject.

S. 1419, as entirely rewritten was passed by the House, 231 to 23. Section 9(b) as passed by the House was accepted by the Senate without alteration or debate.

After some modification in other sections of the bill, the Senate approved the measure and appointed a special committee composed of three members each from the Committee on Commerce and the Committee on Public Lands, to meet with House conferees on the proposed legislation. The conference reported out a compromise which passed the House but which was filibustered to death in the Senate by Senator LaFollette of Wisconsin in order to prevent passage of the pending General Deficiencies bill, which he hoped in turn

would force President Wilson to call a special session in Congress and thus prevent him from attending the Peace Conference in Paris."[38]

At the very next session of Congress, S. 1419 as agreed to by the conferees, was introduced in the House as H. R. 3184, and a new special Committee on Water Power was appointed. Inasmuch as the newly constituted special Committee was practically the same as the old one and in view of the volume of hearings already produced on the subject, the new Committee reported out the bill without further hearings. Section 9(b) was left unaltered in the new bill.

There was no debate on Section 9(b) directly in the new session of Congress. There were two oblique references to the section made in the House, however, which might be noted. In response to a query of Representative Goodykoontz of West Virginia as to whether or not a dam could be erected on the Kanawha River in defiance of the wishes of the people below the site of the proposed dam who might be concerned for their safety in the event of a break in the dam, Representative Sinott quoted Section 9(b).[39] Mr. Sinott also indicated that in his opinion Section 9(b) applied before as well as subsequently to the issuance of a license.[40] There was no mention in the Senate of Section 9(b) of the new bill.

H. R. 3184 was passed by the House and the Senate and became law when the President signed the bill June 10, 1920.

c. *Summary.*

Although the legislative history of the Federal Water Power Act is exasperatingly voluminous, the foregoing references to Section 9(b) are the only ones relating di-

[38] For a description of the occasion and of President Wilson sitting in the Capitol to await the outcome, see New York Times, March 5, 1919.

[39] Cong. Rec., Vol. 58, Part 3, pp. 2225-2226.

[40] *Ibid.*

rectly to that provision. These references, unfortunately, are far too few and were made for the most part without a careful choice of expression. Excerpts from statements made during the hearings and the debate on Section 9(b) can be quoted either in support of the proposition that the section is or *is not* a limitation on the licensing power of the Federal Power Commission. There was a great deal of chattering about "compliance with state laws" in the historical development of the section, without anyone clearly defining what was intended by the phrase.

There is, however, no evidence that Congress intended Section 9(b) to be a limitation on the licensing power of the Federal Power Commission, there is some evidence that Congress did not intend it to be a limitation, there is considerable evidence that Congress did intend it to be a guide for administrative officers, and there is considerable evidence that Congress intended it to be a restatement of existing constitutional law on the subject.

The magnifying glass approach to the legislative history is an unsatisfactory method of determining the ultimate intent of Congress in inserting Section 9(b). True perspective of the position the Section occupies in the Federal Water Power Act is retained, however, if it be remembered that Congress was embarking on an absolutely new and untried field of federal regulation and was consequently eager to prevent the legislative innovation from being declared unconstitutional by the courts. This eagerness was, in part, responsible for the insertion of Section 9(b).

There is, moreover, little doubt that Congress desired to avoid as much conflict as possible between the national and state governments in the administration of the Federal Water Power Act. To this end Section 9(b) appeared a reasonable solution. Though not clearly evident from the wording of the section, the weight of the evidence revealed in the legislative history of Section 9(b) supports the conclusion that when Congress provided that an applicant must submit "satisfactory evidence" of compliance with state

laws, Congress intended for an applicant to comply only with such state laws as did not interfere with the erection of a power project under the supervision of the Federal Power Commission. Congress contemplated that Section 9(b) should be viewed as a legislative declaration of policy, not as a condition precedent to the granting of a license.

In administering the Federal Water Power Act, the Federal Power Commission should, in conformance with Congressional policy, insist that an applicant comply with all the laws of the state or states, within which he proposes to locate a project, which do not thwart the express will of Congress to provide for a comprehensive scheme of navigation and water power development.

Although the legislative history of Section 9(b) supports these conclusions, it is appropriate to investigate the propriety of examining the legislative history of the Section, the interpretation given the Section by the Commission and the courts, and the constitutional questions involved, before arriving at a final conclusion.

PART XI—SUMMARY AND CONCLUSION.

The Federal Water Power Act was passed by Congress in response to a demand for comprehensive water power legislation. Congress intended that, within constitutional limits, the Federal Power Commission should implement the Congressional policy expressed in the Act. Congress also desired that the Commission should administer the Federal Water Power Act with a minimum of conflict with the laws of the various states.

In part to achieve this end, Congress inserted Section 9(b) in the Federal Water Power Act. Section 9(b) should be considered, however, only as a Congressional declaration of policy to harmonize Federal power activities with those of the several states, not as a condition precedent to the granting of a license by the Federal Power Commission. The Commission should, in the interests of comity,

carry out this direction of Congress as long as State laws do not impede the general intent of Congress as expressed in the entire Act.

Congress further desired to point out to the courts that it had no intention of invading the police and tax powers reposing in the States under the Constitution. To this end also, Section 9(b) was inserted in the Federal Water Power Act.

Because of the questions which arise regarding Section 9(b), it is appropriate and necessary to study the legislative history of the Federal Water Power Act to determine the intent of Congress.

Until 1944 the Federal Power Commission administered the Federal Water Power Act in conformance with the policy expressed by Congress. The Commission has compelled applicants for a license to comply with the provisions of the laws of the various States when such compliance was constitutionally necessary. The Commission has, in addition, required compliance with the laws of the various states when such compliance did not impede the general policies expressed in the Federal Water Power Act. On January 29, 1944, however, when a situation was presented whereby compliance with state laws prevented a comprehensive scheme of water power development, the Federal Power Commission ruled that Section 9(b) of the Federal Water Power Act was mandatory, not directory as to policy. The Commission inferentially held that Section 9(b) contemplated an abandonment by the Federal Government of the concurrent and usually exclusive jurisdiction it exercises over the streams of the nation in favor of the States, if state statutes required such an abandonment. This ruling apparently was made without recourse to the legislative history of Section 9(b), without citation of authority, and in complete disregard of the judicial interpretation given since 1920 to the Federal Water Power Act and its various sections.

The courts have repeatedly emphasized the intention of Congress to provide for comprehensive water power devel-

opment by the Federal Water Power Act and have consistently upheld a broad constitutional basis of authority for the Federal Power Commission to carry out the provisions of the Act. The courts have, furthermore, indicated by the interpretation of sections of the Federal Water Power Act similar to Section 9(b) that such provisions recognize rights acquired under state laws, but that such rights may be extinguished by eminent domain proceedings instituted in accordance with the Act.

Considering all the factors enumerated above and elsewhere in this paper, the ultimate conclusion is that Section 9(b) of the Federal Water Power Act requires compliance with the laws of the State or States within which an applicant proposes to locate a project when the Federal Constitution requires such compliance, but that compliance with other state laws is a problem for administrative determination by the Federal Power Commission in the light of policy as expressed by Congress in the Federal Water Power Act.

LEGISLATIVE HISTORY OF FEDERAL POWER ACT, WITH PARTICULAR REFERENCE TO SECTIONS 9(b) and 27*

The bills which led to the enactment of the Federal Water Power Act in 1920 may be divided into the navigable waters bills and the public lands bills.

The navigable waters bills were the Adamson Bill of 1914, H. R. 16053, 63rd Cong., 2nd Sess., the Adamson Bill of 1916, S. 3331, 64th Cong., 1st Sess., and the Shields Bill of 1917, S. 1419, 65th Cong., 2nd Sess., later amended by incorporating the provisions of H. R. 8716, 65th Cong., 2nd Sess., which changed it to the present Federal Water Power Act.

The public lands bills were the Ferris Bill of 1914, H. R. 16673, 63rd Cong., 3rd Sess., and the Ferris Bill of 1916, H. R. 408, 64th Cong., 1st Sess.

The bill which became the Federal Water Power Act was H. R. 3184, 66th Cong., 1st Sess.

Section (9). The provisions of Section 9(b) of the Federal Water Power Act for the submission of evidence with respect to the applicant's compliance with requirements of certain specified kinds of State laws are in striking contrast to the corresponding provisions which first appeared in the antecedent navigable waters bills and which made compliance with State laws in general a condition precedent to the issuance of the Federal permit.

The Adamson Bill of 1914 in Section 14 had a provision to the effect "that the Secretary of War, upon the advice and with the approval of the Chief of Engineers, may lease to any applicant *having complied with the laws of the state* in which the dam is constructed or to be constructed by the United States, the right to develop power from the surplus water over and above that required for navigation at any navigation dam now or hereafter constructed * * *." 51 Cong. Rec. 12407. [Emphasis supplied.]

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* Taken from Brief of Counsel for the Federal Power Commission as filed with the Court below.

The Adamson Bill of 1916, S. 3331, had a provision in Section 2 regarding compliance with state laws, reading as follows:

> As between contesting applicants for a permit hereunder having the legal qualifications required by this Act, and being equally well qualified to improve or develop waterways for the uses of interstate or foreign commerce, preference shall be given to that applicant which is best qualified to expedite and realize the maximum useful development of all the water resources of the region; and as between such contesting applicants which appear equally well qualified in such respect, then preference shall be given to that applicant which *has first complied with the laws of the State or States* in which the dam or diversion structure is to be constructed. [Emphasis supplied.]

The Shields bill, S. 1419, in its original form, contained provisions similar to that in the Adamson bills as to compliance with State law with the provision added to the effect that in all cases the permittee must first obtain the consent of the State or States in which the dam is to be constructed, reading as follows:

> As between contesting applicants for a permit hereunder having the legal qualifications required by this Act, and being equally well qualified to comply with the conditions imposed herein, preference shall be given to that applicant which *has first acquired the right to divert the water of the stream* by means of the dam to erect which the permit is sought *and otherwise complied with the laws of the State or States* in which the dam or diversion structure is to be constructed; or if there are no State laws to be complied with the preference shall be given to the first applicant. In granting permits hereunder and fixing conditions thereof, and in prescribing rules and regulations as to the maintenance and operation of any structure to which this Act is applicable, the Secretary of War, before acting, shall have the report and advice of the Chief of Engineers: *Provided, however*, That before the permit shall be granted under this Act, the permittee must first

obtain, in such manner as may be required by the laws of the States, *the consent of the State or States* in which the dam or other structure for the development of the water power is proposed to be constructed. [Italics supplied.]

The first provision[1] corresponding to Section 9(b) to appear in the antecedent public lands bills was in the second Ferris bill of 1916, H. R. 408, which contained the following provision:

> *Provided*, That no lease shall be granted until the applicant *has complied with the requirements of the laws* of the State, States, or Territory wherein said project is to be located, providing for the appropriation of water to develop or generate the electrical energy intended to be generated by applicant's proposed project. [Italics supplied.]

The first combined navigable waters and public lands bill was H. R. 8716, introduced January 15, 1918, as the House substitute for the original Shields bill, S. 1419, and subsequently adopted in the House as an amendment to S. 1419. Section 9(b) of the House substitute was identical with Section 9(b) of the Federal Water Power Act as subsequently enacted, except that it did not include the words "bed and banks and" which were added by amendment in the House (56 Cong. Rec. 9810, 9811). Section 9(b) in the House substitute, H. R. 8716, marked a distinct departure from the corresponding provisions in the antecedent bills. Not only was all language requiring State "consent" omitted, but the language with respect to compliance with State laws was changed in two respects: first, the State laws referred to were narrowly limited to those "with respect to the appropriation, diversion, and use of water for power purposes, and with respect to the right to engage in

[1] This provision apparently was an outgrowth of an amendment to Section 1 of the first Ferris bill, H. R. 19673, introduced by the Senate Committee on Public Lands. See Sen. Rep. 898, 63rd Cong., 3rd Sess., pp. 1, 4, 5.

the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act." Second, instead of making compliance with State laws a condition precedent to the issuance of the license, the Commission was authorized, in its discretion, if it should consider that the applicant had not submitted "satisfactory evidence" of compliance with State law, to refuse to proceed further administratively with consideration of the application.

The various attempts to amend the language of Section 9(b) as it appeared in the House substitute, H. R. 8716, and the committee reports and debates relating thereto, confirm this understanding of the Congressional purpose.

The first amendment proposed was that recommended by the Secretaries of War, Interior and Agriculture, who, in a letter dated February 17, 1918, to Honorable T. W. Sims, Chairman of the Special House Committee on Water Power, submitted their proposed amendments to H. R. 8716 (House Rep. 715, 65th Cong., 2nd Sess.) to accompany S. 1419, pp. 29-39. The Secretaries proposed to change Section 9(b) so as to require the submission of satisfactory evidence of compliance with State laws with respect to "*application* for the right to appropriate (etc.)," instead of compliance with State laws with respect to "the *appropriation* (etc.)." This proposed amendment was not adopted by the committee and was thereafter offered on the floor of the House by Representative Raker as an amendment to Section 9(b) (56 Cong. Rec. 9812).

> Mr. RAKER. * * * Now, let me call this to the attention of the committee: Here is an application according to the laws of my State and of the other States, where he has complied with the water laws in making his application for a right to use the water. He has absolutely no right, he has nothing in the way of an indefeasible water right, until he has completed the work and placed the water in actual use. Now, when he makes that application this provision in the law to-day is absolutely impossible to be complied with, because

you require him to show that he has built the dam and constructed the ditches and put the water to an actual beneficial use before he is ever in a position to do it, when he had paid out, maybe, a million dollars or two million dollars to construct the dam and build the ditches so that he can turn the water into the head and commence to generate electricity. Now, if the man has complied with the law relating to the application for the water right, for its diversion and appropriation and use, and then gets his permit and proceeds and actually develops it according to that project, the moment he turns the water over the wheel the first time, or turns it upon the land to irrigate it, his right is complete and retroacts back to the time when he gave the notice, and no intervening party can come along and prevent it in the meantime. But to say that he must prove a valid water right at the time of making the application, I tell you it can not be done * * * (56 Cong. Rec. 9813.)

The viewpoint of those who opposed Congressman Raker's amendment and who ultimately prevailed is indicated by the following statements by Congressmen Mondell and Walsh:

Mr. MONDELL. The gentleman's argument is all based on the assumption that this paragraph requires the perfection of a water right. There is nothing in the paragraph that requires the perfection of a water right (56 Cong. Rec. 9813).

Mr. MONDELL. The bill provides that all provisions of the law, whatever they may be, shall have been complied with up to that time (56 Cong. Rec. 9813).

Mr. WALSH. I think if a person has filed his application for the right to appropriate water, and has complied with the laws respecting the filing of applications, it is not necessary that he should actually have appropriated the water in order for him to be said to have complied with the laws respecting the appropriation of water (56 Cong. Rec. 9813).

Mr. MONDELL. Mr. Chairman, I hope the amendment offered by the gentleman from California [Mr. Raker] will not prevail. I think the gentleman must

have offered his amendment under a misapprehension of the meaning and effect of the language of the provision. The gentleman is assuming that the language which he attempt to amend requires a completed water right and a water right certificate before the party shall be granted a license under this act or his application be considered. That is not true at all. The provision is that the applicant shall have complied with the laws of the State with respect to the appropriation, diversion, or use of water; that is, he shall have complied with all of the laws of the State applicable to the situation up to the time he makes his application. As was suggested a moment ago when the amendment offered by the gentleman from New Jersey was under consideration, there are other requirements of State law that will apply after the license has been granted and construction begins, requirements that will continue on through the period of construction and through the period of operation. This provision has no reference to such requirements. It simply requires that the State laws shall be complied with so far as the applicant can comply with them in the nature of things up to the time he makes his application. Now, from the standpoint of the Commission very great harm would come if the amendment the gentleman proposes should be adopted. There are two controlling reasons for the insertion of this paragraph. The first, from the standpoint of water-power legislation, is that the water-power commission shall have the benefit of all of the information which the States possess relative to the condition of water supply at the point of proposed diversion. That is a very important reason for a provision of this kind. Another reason—(56 Cong. Rec. 9813-9814).

Mr. MONDELL. The second reason is so that the bill shall carry with it notice to the commission that they must proceed in accordance with the State laws, which they must do in any event, whether the provision were in the bill or not (56 Cong. Rec. 9814).

As already stated, the additional words "bed and banks and" were added by an amendment in the House offered by Congressman LaFollette, who explained the reason for the amendment as follows:

Mr. La Follette. Mr. Chairman, in this section, by the provision that the applicant for a license shall have complied with the rules and laws of the State in regard to the diversion of water, we are trying not to infringe the rights of the States in that respect, and I wish to call the attention of the committee to the fact that many Supreme Court decisions in respect to States' rights as to water also refer to States' rights as to the beds and banks, and I would like to read from the latest United States Supreme Court decision upon this question, delivered on May 12, 1917. The opinion was delivered by Mr. Justice Pitney, and in that he says:

"The States have authority to establish for themselves such rules of property as they may deem expedient with respect to the streams of water within their borders, both navigable and nonnavigable, and the ownership of the lands forming their beds and banks."[2]

In many States the law gives the riparian owner title to the middle of the stream. In other States only to the high-water mark. The property rights are within the State. It can dispose of the beds, or parts of them, regardless of the riparian ownership of the banks, if it desires to, and that has been done in some States. If we put in this language, which is practically taken from that Supreme Court decision, as to the property rights of the States as to the bed and banks and to the diversion of the water, then it is sure that we have not infringed any of the rights of the States in that respect, or any of their rules of property, and we are trying in this bill above everything else to overcome a divided authority and pass a bill that will make it possible to get development (56 Cong. Rec. 9810-9811).

Thus, the limited scope of the state laws referred to in Section 9(b) and the clear purpose of Congress not to require state consent to the hydroelectric developments to be licensed by the Commission, finds corroboration at every stage in the legislative history of the provision.

Section 27. In the case of Section 27, the outstanding fact in its legislative history is its derivation through the public

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[2] The language quoted by Congressman La Follette will be found in *United States* v. *Cress*, 243 U. S. 316, 319.

lands bills from Section 8 of the Reclamation Law of 1902, c. 1093 (32 Stat. 390), U. S. C. Title 43, §383, reading as follows:

> Nothing in sections 372, 373, 381, 383, 391, 392, 411, 416, 419, 421, 431, 432, 434, 439, 461, 491 and 498 of this title shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of such sections, shall proceed in conformity with such laws, and nothing in such section shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to or from any interstate stream or the waters thereof. (June 17, 1902, ch. 1093, §8, 32 Stat. 390).

This language was reflected in Section 14 of the Ferris Bill of 1914, H. R. 16673, which reads as follows:

> SECTION 14. That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired thereunder.

Congressman Mondell's discussion of this provision in the second Ferris Bill makes it even clearer that the provision was based upon the proprietary nature of the interests of the United States and was intended to relate particularly to the public land states of the West in which the law of prior appropriation obtained:

> Mr. MONDELL. Water Rights Under State Control. Let us not forget that the primary and essential right upon which any enterprise of this character is based in the public-land States is a right received from the people of the State and not from the Federal Government. The people of the Commonwealths of the West are the owners and proprietors of all the waters within their borders, and the only right that any individual can

> have or secure at least in the majority of the public-land States, is the right to use the water at a certain designated place for a specific and useful purpose; and the right continues so long as at that place for that purpose those waters are beneficially applied. The Federal Government can give no grant of right to build power plants on public lands in the Western States that will carry with it any right to divert a drop of water or to use a drop of water for the turning of any wheel or turbine. That right, under the laws of the States, recognized by the Federal Constitution and the courts, must be secured from the people through the authorities they have provided in the States. That right in all of the States is perpetual, so long as the water shall be used at that place for that beneficial purpose (51 Cong. Rec. 13630-13631).

A broader version of the provision appeared in the Ferris Bill of 1916, H. R. 408.

> SEC. 13. That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State relating to the control, appropriation, use, or distribution of water.

This provision did not reappear in the first combined navigable waters and public lands bill, H. R. 8716, but reappeared in the narrower original form in the amended Shields Bill, S. 1419, and H. R. 3184, and was enacted as Section 27 of the Federal Water Power Act in substantially the original form. Section 27, as enacted, reads:

> That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water *used in irrigation or for municipal or other uses, or any vested right acquired therein.* [Italics supplied.]

Thus the origin and history of Section 27 confirms what a consideration of its language indicates, that the state laws therein referred to are laws governing property rights, particularly the laws of the public lands states in which the law of prior appropriations obtains.

No. 603

Supreme Court of the United States

OCTOBER TERM, 1945.

FIRST IOWA HYDRO-ELECTRIC COOPERATIVE, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*,

STATE OF IOWA, *Intervenor*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

REPLY BRIEF FOR FIRST IOWA HYDRO-ELECTRIC COOPERATIVE.

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March 6, 1946.

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REPLY BRIEF FOR FIRST IOWA HYDRO-ELECTRIC COOPERATIVE.

The presentation of some of the issues in the briefs for the Federal Power Commission and the State of Iowa lead the Petitioner to submit this reply.

ARGUMENT.

I.

Comity.

The Federal Power Commission argues that the refusal of the court below to pass upon the applicability and constitutionality of Chapter 363 of the Iowa Code was an appropriate observance of the well established principle of

comity.[1] The principle relied upon is expressed in *Hillsborough* v. *Cromwell*, No. 305, this Term, decided January 28, 1946:

> "That where a Federal constitutional question turns on the interpretation of local law and the local law is in doubt, the proper procedure is for the Federal Court to hold the case until a definite determination of the local law can be made by the State Court."

The cases relied on to sustain this position[2] have generally arisen where a state administrative body made a ruling which a party considered a violation of a federal constitutional right. Without following an available review procedure in the state court the aggrieved party has sued in the District Court of the United States usually under the Federal Declaratory Judgment Act.

Here Petitioner has applied to the Federal Power Commission under a federal statute for a license which it must have in order to construct its proposed project. The application was denied because the Commission interpreted Section 9(b) of the Federal Power Act as requiring compliance with Chapter 363 of the Iowa Code (R. 13, 14). On review under Section 313(b) of the Federal Power Act the question for the Court of Appeals was whether a proper construction of the Federal Power Act required compliance with the Iowa law. The rule of comity does not require that federal courts submit the construction of a federal statute to state courts.

The construction of the Congressional intent is now before this Court. The question is whether the Federal Power

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[1] Respondent's Brief, pp. 24-38. In its opinion and in the court below the Commission thought that review under Section 313(b) was appropriate to obtain a decision on the issue of the constitutionality and applicability of the Iowa Statute (R. 13, 48; Resp. Br. 9) and that the court should have decided that issue (Resp. Br. 10). The argument of the Intervenor (Br. 29, 31) treats the issue as the Petitioner's failure to exhaust its administrative remedy. Perhaps that is the position of the Court of Appeals (R. 44).

[2] Respondent's Brief, p. 29.

Act vested in the Commission the sole responsibility for licensing projects in navigable waters of the United States. Cf. *Hines* v. *Davidowitz*, 312 U. S. 52; *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148.

As an incident to this review under the Federal Power Act it is appropriate for this Court to interpret the State law.[3] *United States* v. *Bellingham Bay Boom Co.*, 176 U. S. 211; Cf. *Meredith* v. *Winter Haven*, 320 U. S. 228; *Markham* v. *Allen*, No. 60, this Term, decided January 7, 1946.

II.

Federal and State Cooperation.
v.
Joint Federal and State Control.

Petitioner and Respondent have contended in their respective briefs[4] that, by virtue of the provisions of the Federal Power Act, Congress has assumed complete control over power projects located in navigable waters of the United States to the exclusion of state control. However, the State of Iowa is so insistent that the Federal Power Act "contemplates a dual system of control by both the State and the Federal Government,"[5] and indicates "clearly that Congress did not intend to preempt and take over the entire field"[6] that a further comment on the question seems appropriate.

The provisions of Part I of the Federal Power Act clearly show that it was the purpose of Congress to take complete jurisdiction over navigable waters of the United States.[7]

The decisions of this Court sustain the broad scope and purpose of the Federal Power Act. *State of New Jersey* v.

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[3] See Petitioner's Brief, pp. 43-47.

[4] Petitioner's Brief, pp. 13-52; Respondent's Brief, pp. 30-58.

[5] Intervenor's Brief, p. 19; cf. pp. 7-8.

[6] Id. at p. 17.

[7] See Petitioner's Brief, pp. 13-27, and Respondent's Brief, pp. 37-57.

Sargent, 269 U. S. 328 377; *United States* v. *Appalachian Power Co.*, 311 U. S. 377. In his concurring opinion in *Northwest Airlines* v. *Minnesota*, 322 U. S. 292, Mr. Justice Jackson indicates the national and exclusive character of the control of navigable waters. At page 303, he said: "Students of our legal evolution know how this Court interpreted the commerce clause of the Constitution to lift navigable waters of the United States out of local controls and into the domain of federal control. *Gibbons* v. *Ogden*, 9 Wheat. 1, to *United States* v. *Appalachian Power Co.*, 311 U. S. 377."

Consistent, however, with the necessity for undivided control over the determination as to the place where a power project is to be located, the plans therefor, and the construction, maintenance and operation of the project, Congress provided in the Federal Power Act the means for considering every legitimate interest of the States: Sec. 4(c) provides for cooperation with the States in the investigation of the water resources of any region; Sec. 4(f) provides for notice to the State of an application for a preliminary permit; Sec. 7(a) provides that the Commission shall give preference to applications by States for licenses; Sec. 10(e) provides exemptions for State licensees under the Act; Sec. 14 provides that the States may take over licensed projects at any time upon payment of just compensation; Secs. 19 and 20 provide for State regulation of rates; and Sec. 27 "saves" State laws dealing with irrigation, municipal and other uses of waters. The foregoing Sections of the Federal Power Act were cited by the court below (R. 47) in support of its statement that "the Act contemplates a dual system of control" by the State and the Federal Government (R. 46)[8]. The identical Sections are also mentioned by the State of Iowa[8] in support of the same proposition. These Sections support the conclusion that nowhere in the Federal Power Act did Congress provide for joint State and Federal *control* over the construc-

[8] Intervenor's Brief, p. 19.

tion, maintenance and operation of power projects on navigable streams of the United States.

The State of Iowa contended in its Petition to Intervene in the court below that the construction of the project proposed by Petitioner was prohibited by State law (Chapter 363 of the Iowa Code) (R. 38). In the absence of an interpretation of Chapter 363 of the Iowa Code by the Courts of that State, it would seem that the State is bound by its pleading.[9] In any event, the State law is clear to the effect that the project proposed by petitioner cannot be licensed by the State, by reason of the prohibition against diversion of water without returning it to the nearest practicable place. The water is not to be returned to the stream. (Section 7771, Chapter 363, Iowa Code, 1939). The State has, however, attempted to retreat from its position[10] and alleges in its brief before this Court that the Executive Council of the State may see fit to grant a permit to petitioner upon appropriate application being made. However, the conflict between other provisions of the State power act and the Federal Power Act strikingly demonstrate why, in any event, the two Acts cannot have valid application to the same project. There is set forth below in parallel columns the provisions of Chapter 363 of the Iowa Code which are in conflict with provisions of the Federal Power Act.

Federal Power Act	*Chapter 363, Iowa Code, 1939*
Sec. 23(b)	§ 7767
"It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or	*"Prohibition—permit.* No dam shall be constructed, maintained, or operated in this state in any navigable or meandered stream for any purpose, or in any other stream for manufacturing

[9] *Cf. Northern Pacific Ry. Co.* v. *Paine*, 119 U. S. 584; *Putnam* v. *Day*, 22 Wall. 60; *Jones* v. *Morehead*, 1 Wall. 155.

[10] Intervenor's Brief, pp. 18, 29, 33, 35.

Federal Power Act	*Chapter 363, Iowa Code, 1939*

other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act. * * *"

Sec. 4(c)

"* * * *Provided further*, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting navigation have been approved by the Chief of Engineers and the Secretary of War."

Sec. 10(c)

"That the licensee shall maintain the project works in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the development and transmission of power, shall make all necessary renewals

or power purposes, nor shall any water be taken from such streams for industrial purposes, unless a permit has been granted by the executive council to the person, firm, corporation, or municipality constructing, maintaining, or operating the same."

§ 7776

"*Construction and operation.* The executive council shall investigate methods of construction, reconstruction, operation, maintenance, and equipment of dams, so as to determine the best methods to conserve and protect as far as possible all public and

Federal Power Act

and replacements, shall establish and maintain adequate depreciation reserves for such purposes, shall so maintain and operate said works as not to impair navigation, and shall conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health, and property."

Sec. 13

"That the licensee shall commence the construction of the project works within the time fixed in the license, which shall not be more than two years from the date thereof, * * * The periods for the commencement of construction may be extended once but not longer than two additional years and the period for the completion of construction carried on in good faith and with reasonable diligence may be extended by the commission when not incompatible with the public interests. In case the licensee shall not commence actual construction of the project works, or of any specified part thereof, within the time prescribed in the license or as extended by the commission, then, after due notice given, the license shall, as to

Chapter 363, Iowa Code, 1939

riparian rights in the waters of the state and so as to protect the life, health, and property of the general public; and the method of construction, operation, maintenance, and equipment of any and all dams in such waters shall be subject to the approval of the executive council."

§ 7792

"*Revocation or forfeiture of permit.* If the person to whom a permit is issued under the provisions of this chapter does not begin the construction or the improvement of the dam or raceway within one year from the date of the granting of the permit, his permit may be revoked by the executive council, and if any permit holder does not finish and have in operation the plant for which the dam is constructed within three years after the granting of the permit, unless for good cause shown the council has extended the time for completion, such permit shall be forfeited."

Federal Power Act	*Chapter 363, Iowa Code, 1939*

such project works or part thereof, be terminated upon written order of the commission."

Sec 6	§ 7793
"Licenses under this Part shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all the terms and conditions of this Act and such further conditions, if any, as the Commission shall prescribe in conformity with the Act, which said terms and conditions and the acceptance thereof shall be expressed in said license. Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this Act, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice."	"*Legislative control.* No permit granted or rights acquired hereunder shall be perpetual, but they shall be subject to restriction, cancellation, and regulation by legislative action, and subject to all the provisions of this chapter."

United States v. *West Virginia*, 295 U. S. 463, is the only case in which this Court had occasion to refer to Section 9(b) of the Federal Power Act. That case is considered in the briefs of all parties to this proceeding.[11] The complaint in that case was filed in this Court on January 14, 1935, the case was argued on May 2, 1935, and decided on May 20,

[11] Respondent's Brief, pp. 54-55; Intervenor's Brief, pp. 12, 21, 30, 36-37; Petitioner's Brief, pp. 38-42.

1935. The Federal Water Power Act of 1920 was amended by the Act of August 26, 1935, and became the Federal Power Act. Section 23 of the Act was amended to require that when a dam was to be constructed upon a non-navigable water of the United States a declaration of intention must be filed with the Federal Power Commission. Prior to the Act of August 26, 1935, the filing of a declaration of intention to construct such a project was discretionary.[12] Section 23(b) now is all inclusive and clearly delineates the respective spheres of jurisdiction and control by the states and the federal government in so far as the licensing of power projects is concerned. State water power acts can have valid application only where the proposed construction of a power project is not upon navigable waters of the United States, and where the interests of interstate and foreign commerce are not affected.

III.

The State Highway Laws.

Section 7796 of Chapter 363 of the Iowa Code provides:

> "Whenever the erection of any such dam will affect highways or state-owned lands, the applicant shall as a condition precedent secure a permit from the board, commission, or other official body charged with jurisdiction over and control of said highways or state-owned lands."

Petitioner has discussed this provision of Chapter 363 in its main brief at page 43. The Respondent in its brief at page 27 (footnote 13) suggests to this Court alternate

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[12] In the *West Virginia case*, the New-Kanawha Power Company had obtained a license from the Public Service Commission of West Virginia to construct a dam on the New River. It had not filed a declaration of intention under Section 23 of the Federal Power Act [illegible] there had been no determination as to navigability of the New River. There are set forth as Appendices B and C to this brief excerpts from the Committee Reports to the Senate and House regarding Section 23 of the Power Act.

grounds for rejecting the view of the court below that "the Commission's order must stand" for the "reason alone" that "nothing appears in the record to excuse petitioner's failure to comply with Section 7796" (R. 57). As additional reasons for its contention that Section 9(b) of the Federal Power Act does not require compliance with Section 7796 of the Iowa Code, Petitioner submits: (1) That Section 9(b) does not apply to that type of law—it requires compliance only with State laws "with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power * * *"; (2) Were Petitioner to secure the license which it is seeking from the Federal Power Commission, it could, as to the State highways involved, proceed under the provisions of Chapter 364 of the Iowa Code, which is set forth fully as Appendix A to this brief, and which would permit petitioner to make whatever use may be necessary of state highways so long as, at its own expense, it put such highways in good repair and condition for the safe and convenient use of the public; (3) If necessary, petitioner may make use of the eminent domain provisions of Section 21 of the Federal Act.[13]

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[13] *Missouri* v. *Union Electric Light & Power Co.*, 42 F. (2d) 692; Cf. *Henry Ford and Son, Inc.* v. *Little Falls Fibre Co., et al.*, 280 U. S. 369, 378-379.

CONCLUSION.

Petitioner reiterates that the sole question before this Court in this case is whether Chapter 363 of the Iowa Code is such a law as must be complied with under the provisions of Section 9(b) of the Federal Power Act in the light of that Act construed as a whole.

Respectfully submitted,

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March 6, 1946.

APPENDIX A.

CHAPTER 364, IOWA CODE, 1939.

WATER-POWER IMPROVEMENTS.

7797 Eminent domain
7798 Use of highways
7799 Public lands
7800 Powers Generally
7801 Completion of Work
7802 Legislative Control

7797 EMINENT DOMAIN. Any person, or any corporation organized for the purpose of utilizing and improving any water power within this state, or in the streams lying upon the borders thereof, may take and hold so much real estate as may be necessary for the location, construction, and convenient use of its canals, conduits, mains, and waterways, or other means employed in the utilization of such water power, and for the construction of such buildings and their appurtenances as may be required for the purposes aforesaid. Such person or corporation may also take, remove, and use, for the construction and repair of its said canals, waterways, buildings, and appurtenances, any earth, gravel, stone, timber or other materials on or from the land so taken. Compensation shall be made for the lands and materials so taken and used by such person or corporation, to the owner, in the manner provided for taking private property for works of internal improvement. (C73, § 1236; C97, § 1990; C24, 27, 31, 35, § 7797). Condemnation proceedings, ch. 366.

7798 USE OF HIGHWAYS. Such person or corporation may use, raise, or lower any road for the purpose of having its said canals, waterways, mains, and pipes pass over, along, or under the same, and in such case shall put such road, as soon as may be, in good repair and condition for the safe and convenient use of the public. Any such person or corporation may construct and carry its canals, conduits, waterways, mains, or water pipes across, over, or under any railway, canal, stream, or watercourse, when it shall be necessary for the construction or operation of the

same, but shall do so in such manner as not to impede the travel, transportation, or navigation upon, or other proper use of, such railway, canal, or stream. The powers conferred in this section can only be exercised in cities and towns with the consent and under the control of the council. (C73, § 1237; C97, §1991; C24, 27, 31, 35 § 7798).

7799 PUBLIC LANDS. Such person or corporation is authorized to pass over, occupy, and enjoy any of the school, university, and saline or other lands of this state, whereof the fee or any use, easement, or servitude therein is in the public, making compensation therefor. No more of such land shall be taken than is required for its necessary use and convenience. (C73, § 1238; C97, § 1992; C24, 27, 31, 35, § 7799).

7800 POWERS GENERALLY. Such corporation, in addition to other powers, shall have the following: To borrow money for the purpose of constructing, renewing, or repairing its works; to make, execute, and deliver contracts, bonds, notes, bills, mortgages, deeds of trust, and other conveyance charging or incumbering its property, including its franchises, or any part or parcel thereof; to erect, maintain, and operate canals, conduits, mains, waterways, mills, factories, and other buildings and machinery, including waterways, sluices, and conduits for the purpose of carrying waste water off from said premises to the stream from which the same was taken, or other convenient place; to let, lease, or sell and convey any portion of their water supply, and any of the buildings, mills, or factories, or machinery, for such sums, prices, rents, tolls, and rates as shall be agreed upon between the parties; and to lay down, maintain, and operate such water mains, conduits, leads, and service pipes as shall be necessary to supply any building, village, town, or city with water; and the grantee of any such person or corporation, or purchaser of said property, franchise, right and privileges under and by virtue of any judicial sale, shall take and hold the same as fully as the same were held and enjoyed by such person or

corporation. (C73, § 1239; C97, § 1993; C24, 27, 31, 35, § 7800).

7801 COMPLETION OF WORK. Such person or corporation shall take, hold and enjoy the privilege of utilizing and improving the water power and the rights, powers, and privileges aforesaid, and shall proceed in good faith to make the improvements and employ the powers above conferred, and shall, within two years from the date of acquiring such powers, provide the necessary capital, complete the preliminary surveys, and actually commence the work of improving and utilizing the water power and furnishing the supply of water as contemplated; and said waterworks and canals shall be completed within five years thereafter. (C73, § 1240; C97, § 1994; C24, 27, 31, 35, § 7801). C97, § 1994, editorially divided.

7802 LEGISLATIVE CONTROL. The rights, powers, and privileges conferred by this chapter shall be at all times subject to legislative control. (C73, § 1240; C97, § 1994; C24, 27, 31, 35, § 7802).

APPENDIX B.

PUBLIC UTILITY ACT OF 1935

(Mr. Wheeler, from the Committee on Interstate Commerce, submitted the following report (to accompany S. 2796))

* * * * *

Section 210

This section also amends the second paragraph of section 23, dealing with the filing of declarations of intention, and makes this paragraph subsection (b) of the section. Under the present provision anyone intending to undertake a project on a nonnavigable tributary of a navigable stream may in his discretion file such declaration with the Commission. If the Commission finds that the interests of interstate commerce would be affected by the project, it is made unlawful to proceed without having secured a license. This provision is changed to make the filing of a declaration of

intention mandatory in such cases. Furthermore, a provision is inserted expressly making it unlawful to construct a project on any navigable waters without a license granted pursuant to the act. This latter provision is in substance the effect of the River and Harbor Act of 1899 when read with the Water Power Act. It is thought desirable to bring together in a single act the positive requirements regarding the construction of water-power projects. Under this subsection, with the two amendments here made, every person intending to construct a project which might conceivably affect any navigable waters would be under the duty of coming to the Commission. The act would be greatly strengthened by enabling the Commission to preserve control over all projects with which the Federal Government has any valid concern.

* * * * *

(Senate Report No. 621—Calendar No. 651—74th Congress, 1st Session).

APPENDIX C.

PUBLIC UTILITY ACT OF 1935

(Mr. Rayburn, from the Committee on Interstate and Foreign Commerce, submitted the following report (to accompany S. 2796))

* * * * *

Section 210

Section 23 is amended to make the same change in the provision for the determination of the value of a project constructed prior to the adoption of the act and voluntarily brought under license that is introduced in section 14 by section 207 of the bill. The present provision for determination by agreement or court proceeding is replaced by a provision that the determination shall be made by the Commission. The second paragraph of section 23, here lettered subsection (b), is also amended by expressly making unlawful the construction of any dam, water conduit, reservoir, or power house in any of the navigable waters of the United States, or upon any of the public lands or reservations in the United States, except pursuant to a permit granted prior to June 10, 1920, or a license granted pursuant to the act.

This provision is in substance the present result under the River and Harbor Act of 1899 and the Water Power Act. Furthermore, the provision making discretionary the filing of applications for preliminary permits for the construction of projects in the nonnavigable tributaries of navigable streams is changed to make such applications mandatory. In this way, every person intending to construct a project which might affect navigation would be required to come to the Commission for a determination of the interests of the United States. This would greatly strengthen the act by enabling the Commission to maintain control over all projects with which the Federal Government has any valid concern. The bill as reported is narrower than that originally introduced in that the prohibition against the construction of a 'dam, water conduit, reservoir, power house, or other works' in the original is changed so as to have 'other works' limited to works incidental to the foregoing enumerated works. The provision included in the Senate bill relating to rights granted to States under the Boulder Canyon Act and other Government dams have not been included by the committee.

* * * * *

(House of Representatives Report No. 1318, 74th Congress, 1st Session.)

APPENDIX D.

DEVELOPMENT OF WATER POWER

(Mr. Jones of Washington, from the Committee on Commerce, submitted the following report (to accompany H. R. 3184))

* * * * *

It is unnecessary to point out the need for or the beneficent results to come from water power development. It means a saving of coal, and a lower price for that used; a saving of oil, and a lower price for that consumed; more efficient transportation, and lower cost of service; the development of new industries; the building up of new communities; the creation of new property values, subject to taxation for the support and maintenance of local and State governments; and added employment for labor and increased markets for agricultural products. Every year that

our water powers are undeveloped means a loss to the people in one form or another, almost, if not quite, equal to the cost of their development. Legislative action should be delayed no longer. We should do one of two things: We should pass legislation which will lead private capital and enterprise to develop these resources under such regulations as will give consumers good service and cheap power, or the Government itself should proceed to make this development. This bill proceeds on the theory of private development with ultimate public ownership possible. The House report is made a part of this report and, following it, the bill as recommended by the committee

* * * * *

(Senate Report No. 180, Calendar No. 155, 66tn Congress, 1st Session.)

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 603

FIRST IOWA HYDRO-ELECTRIC COOPERATIVE, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

STATE OF IOWA, INTERVENOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

MEMORANDUM FOR THE FEDERAL POWER COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (R. 54–72) is reported in 151 F. 2d 20. The opinion and order of the Federal Power Commission (R. 11–17) are reported in 52 P. U. R. (NS) 82.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 1945 (R. 72–73). The petition for writ of certiorari was filed November 13,

1945. The jurisdiction of this Court is invoked under Section 313 (b) of the Federal Power Act (49 Stat. 860, 16 U. S. C. 825*l*), and Section 240 (a) of the Judicial Code, as amended by the act of February 13, 1925.

QUESTION PRESENTED

The question presented is whether the court below properly declined to pass upon the constitutional validity of Chapter 363 of the Iowa Code of 1939 in the absence of a decision on that question by the courts of Iowa.

STATUTES INVOLVED

The pertinent provisions of the Federal Power Act (June 10, 1920, c. 285, 41 Stat. 1063, amended August 26, 1935, c. 687, 49 Stat. 838, 16 U. S. C. 791a–825r) and of the Iowa Code (Chapter 363, Iowa Code, 1939, Secs. 7767–7796.1) are set forth in the Appendix, *infra*, pp. 12–23.

STATEMENT

Upon a declaration of intention to construct a hydro-electric power development on the Cedar River in the State of Iowa, filed by petitioner under Section 23 (b) of the Federal Power Act, the Commission found, after investigation, that the Cedar River and the Iowa River into which it flows are navigable waters of the United States (R. 14, fn.) and that the proposed project would affect the navigable capacity of the Mississippi River and the interests of interstate commerce

(*First Iowa Hydro-Electric Cooperative*, 2 F. P. C. 958, 959, 960). Thereafter, on August 11, 1941, petitioner filed an application for license under Section 4 (e) of the Act (R. 1–10), on which extensive hearings were held (R. 20).

The project for which license ultimately was sought was a modification of the development originally proposed. It consisted of a dam across the Cedar River, some 21 miles above its confluence with the Iowa River, and about 50 miles above the confluence of the latter with the Mississippi River; a diversion canal to carry the water about 8 miles from the reservoir created by the dam on the Cedar River to a power plant near the Mississippi River into which the water would be discharged about 25 miles above the confluence of the Mississippi and Iowa Rivers (R. 14, 40–42; for map, see Ex. 38, not printed). The modified project included changes suggested by the Chief of Engineers of the War Department (R. 15).

At the hearings on the application, the State of Iowa intervened and objected to the issuance of the license on the ground, *inter alia*, that petitioner had not met the requirements of Section 9 (b) of the Act[1] in that it had failed to submit

[1] "Sec. 9. That each applicant for a license hereunder shall submit to the commission— * * *

"(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion,

"evidence of compliance" with Chapter 363 of the Iowa Code prohibiting construction of a dam "in any navigable or meandered stream for any purpose, or in any other stream for * * * power purposes," unless a permit has been granted by the State Executive Council (Sec. 7767; Appendix, *infra*, p. 20). The State statute provides that such a permit shall be issued only if it appears to the Executive Council that, among other things, the dam "will not materially obstruct existing navigation * * * and any water taken from the stream in connection with the project is returned thereto at the nearest practicable place without being materially diminished in quantity" (Sec. 7771, Appendix, *infra*, p. 21).

The petitioner admitted that it had not applied for a permit from the Executive Council for the modified project, but contended that it was not required to obtain such a permit in order to satisfy the requirements of Section 9 (b). It argued that no permit could be issued under Section 7771 of the Iowa statute since an integral part of the proposed project was the diversion of water from the Cedar River through a canal to

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and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act."

the Mississippi River,[2] and that the Iowa statute, insofar as applicable, was therefore invalid as an undue interference with the authority of the Federal Government over the navigable waters of the United States (R. 17).

The Commission, by its opinion and order of January 29, 194[illegible] found that petitioner had not "presented satisfactory evidence, pursuant to Section 9 (b) of the Federal Power Act, of compliance with the requirements of applicable laws of the State of Iowa requiring a permit from the State Executive Council to effect the purposes of a license under the Federal Power Act" (R. 18). Therefore, although finding that the proposed project called for "a practical and reasonably adequate development" (R. 15), the Commission dismissed the application for license "without prejudice to renewal within one year upon satisfying the requirements of Section 9 (b) of the Federal Power Act" (R. 18-19). While the Commission was of the opinion that it was "bound by the requirements" of Section 9 (b) of the Act, it stated that "the appropriate place for a determination of the validity of such State

[2] The Executive Council twice refused to issue the petitioner a permit for the construction of the originally proposed single river development, which did not involve the diversion of water from the Cedar River to the Mississippi River (Tr. 30, 2999).

laws is in the courts and if we dismiss the application * * * applicant may seek review of our action and its contentions under Section 313 (b) of the Federal Power Act" (R. 17). Application for rehearing by the Commission was denied on March 7, 1944.

Pursuant to Section 313 (b) of the Act, petitioner then sought to set aside the Commission's order by petition for review in the court below (R. 38–47).

The State of Iowa, by its Attorney General, acting pursuant to a special resolution of the State Executive Council, intervened in support of the Commission's order (R. 48–52). It took the position in its motion to intervene (R. 49), that the Executive Council could not lawfully grant a permit for the proposed dam, and argued that there was no conflict because the Federal Act was a merely permissive statute and Congress intended to give the States the power to veto hydro-electric power developments under the Act.

The Commission took the position that it had properly declined to assume the judicial prerogative of holding the Iowa statute invalid in the absence of a controlling judicial precedent, but that on judicial review, that question should be considered and passed upon by the court (R. 59, fn. 15). The Commission then argued that the Iowa statute, as construed by the State Attorney General to prohibit construction of the proposed

project, was invalid because so conflicting with the Federal Power Act as to be superseded by its provisions and not "saved" by Section 9 (b).

The court below affirmed the Commission's order (R. 72–73), but declined to pass upon the validity of the Iowa statute (R. 58). Observing that the question presented "is a difficult one," the lower court held that petitioner should have applied for the State permit and pursued such remedies as may be available in the State to establish its right to issuance of a permit, before applying for a Federal license; that it was the court's duty "to avoid the issue of constitutionality if the statute * * * is susceptible of any reasonable interpretation consistent with constitutionality"; and that in the absence of an Iowa court decision, there were possible interpretations of the Iowa statute under which a State permit could be granted for the project (R. 58–59). It therefore concluded that there had been no showing that the Iowa law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" and, hence, that "the Commission, properly, insisted upon a good faith effort, by its applicant, to comply with the State law" (R. 71–72). In so doing the lower court was, nevertheless, careful to make clear that Congress had not, by Section 9 (b), required State consent to such projects or given the States a veto power over them (R. 66).

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DISCUSSION

The requirement in Section 9 (b) of the Federal Power Act that an applicant for license submit "satisfactory evidence" that it has complied with the State laws therein specified is limited to constitutionally valid State laws. *Poindexter* v. *Greenhow*, 114 U. S. 270, 301–306; cf. *United States* v. *Bellingham Bay Boom Co.*, 176 U. S. 211, 215–216; *Porter* v. *Investors Syndicate*, 287 U. S. 346, 347; *Norton* v. *Shelby County*, 118 U. S. 425, 442.

The Commission, as an administrative agency, properly declined to hold the State statute invalid in the absence of a controlling judicial decision of that question. Cf. *Davies Warehouse Company* v. *Bowles*, 321 U. S. 144, 153. In that case the court held that "State statutes, like federal ones, are entitled to the presumption of constitutionality until their invalidity is judicially declared. Certainly no power to adjudicate constitutional issues is conferred on the" administrative agency. Nor could the Commission, which had already found the Cedar River to be a navigable stream, decline to treat the Iowa statute, which by its terms applied to the construction of dams for power purposes in navigable streams (Sec. 7767, Appendix, *infra*, p. 20), as inapplicable to the proposed project, in the absence of a court decision.

But the lower court in this case was asked by the petitioner, as a "party aggrieved" by the

Commission's order, to set the order aside (and by the intervenor to affirm it) in the exercise of that court's exclusive jurisdiction under Section 313 (b) of the Act to "affirm, modify, or set aside the order." The function of that court in this regard was broader than that of the Commission. An illustrative analogy is found in a comparison of the scope of administrative decision, when objections to the constitutionality of a statute are made in a proceeding before the agency administering such a statute, with the scope of decision on judicial review of the agency's order. Thus, in a proceeding under the Natural Gas Act of 1938, c. 556, 52 Stat. 821, 15 U. S. C. 717, although the Commission properly refused to consider a party's contention that the Act, as applied to it, was unconstitutional (*In the Matter of Mississippi River Fuel Corporation*, 2 F. P. C. 170, 175, 34 P. U. R. (NS) 8), the circuit court of appeals, in reviewing that order,[3] fully considered and passed on that contention. *Mississippi River Fuel Corporation* v. *Federal Power Commission*, 121 F. 2d 159 (C. C. A. 8); see also *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, affirming 2 F. P. C. 218.

Similarly, the Commission's assumption of the validity of Chapter 363 of the Iowa Code, in determining that petitioner had not complied with

[3] Under Section 19 (b) of the Natural Gas Act, which is identical with Section 313 (b) of the Federal Power Act.

Section 9 (b) of the Federal Power Act in this proceeding, did not withhold from the court below jurisdiction to consider and determine the constitutional validity of that statute in a proceeding to review the Commission's order. In the words of the Court in *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 133–134, on review petitioner "can come into court * * * because he urges errors of law outside the Commission's final say-so."

But although the lower court had jurisdiction to decide the question of the constitutional validity of the Iowa statute as applied to the proposed project (*United States* v. *Bellingham Bay Boom Co.*, 176 U. S. 211, 216–218; *Porter* v. *Investors Syndicate*, 287 U. S. 346, 347), it declined to do so on grounds of comity, observing that there were possible interpretations of the Iowa statute under which a State permit might be granted for the project, and that it should avoid the constitutional question in the absence of an Iowa court decision.

Notwithstanding the position taken by the State negativing any such interpretation, when it intervened in the court below, we recognize the possibility that the courts of the State may take a different view, particularly in the light of the opinion below. In view of that possibility it cannot well be argued here that the lower court was guilty of an abuse of discretion in avoiding the constitutional question. Cf. *Asbury Hospital* v. *Cass*

County, No. 35, this Term, decided November 5, 1945, slipsheet opinion, pp. 4–5; *Alabama State Federation of Labor* v. *McAdory*, No. 588, 1944 Term (decided June 11, 1945); *Spector Motor Co.* v. *McLaughlin*, 323 U. S. 101, 105; *Great Lakes Co.* v. *Huffman*, 319 U. S. 293; *Watson* v. *Buck*, 313 U. S. 387, 401–402; *Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168, 171–172; *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496, 501. Accordingly we feel precluded from asking that the decision below be reviewed by this Court.

CONCLUSION

For the reason stated we do not join in the request for issuance of a writ of certiorari.

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Solicitor General.

HOWARD E. WAHRENBROCK,
Assistant General Counsel,

LOUIS W. MCKERNAN,
Principal Attorney,
Federal Power Commission.

DECEMBER 1945.

APPENDIX

Federal Power Act, as amended:

SEC. 4. * * *

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided,* That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the

adequate protection and utilization of such reservation: *Provided further,* That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting navigation have been approved by the Chief of Engineers and the Secretary of War. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: *Provided further,* That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further,* That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection.

* * * * *

SEC. 7. (a) In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section 15 hereof the Commission shall give preference to applications therefor by

States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

* * * * *

SEC. 9. That each applicant for a license hereunder shall submit to the commission—

(a) Such maps, plans, specifications, and estimates of cost as may be required for a full understanding of the proposed project. Such maps, plans, and specifications when approved by the commission shall be made a part of the license; and thereafter no change shall be made in said maps, plans, or specifications until such changes shall have been approved and made a part of such license by the commission.

(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act.

(c) Such additional information as the commission may require.

SEC. 10. All licenses issued under this Part shall be on the following conditions:

(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

* * * * * *

SEC. 11. That if the dam or other project works are to be constructed across, along, or in any of the navigable waters of the United States, the commission may, in so far as it deems the same reasonably necessary to promote the present and future needs of navigation and consistent with a reasonable investment cost to the licensee, include in the license any one or more of the following provisions or requirements:

(a) That such licensee shall, to the extent necessary to preserve and improve navigation facilities, construct, in whole or in part, without expense to the United States, in connection with such dam, a lock or locks, booms, sluices, or other structures for navigation purposes, in accordance with plans and specifications approved by the Chief of Engineers and the Secretary of War and made part of such license.

(b) That in case such structures for navigation purposes are not made a part of the original construction at the expense of the licensee, then whenever the United States shall desire to complete such navigation facilities the licensee shall convey to the United States, free of cost, such of its land and its rights of way and such right of passage through its dams or other structures, and permit such control of pools as may be required to complete such navigation facilities.

(c) That such licensee shall furnish free of cost to the United States power for the operation of such navigation facilities, whether constructed by the licensee or by the United States.

SEC. 12. That whenever application is filed for a project hereunder involving navigable waters of the United States, and the commission shall find upon investigation that the needs of navigation require the construction of a lock or locks or other navigation structures, and that such structures can not, consistent with a reasonable investment cost to the applicant, be provided in the manner specified in section 11, subsection (a) hereof, the commission may grant the application with the provision to be expressed in the license that the licensee will install the necessary navigation structures if the Government fails to make provision therefor within a time to be fixed in the license and cause a report upon such project to be prepared, with estimates of cost of the power development and of the navigation structures, and shall submit such report to Congress with such recommendations as it deems appropriate concerning the participation of the United States in

the cost of construction of such navigation structures.

* * * * * *

SEC. 21. That when any licensee can not acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

* * * * * *

SEC. 23. (a) The provisions of this Part shall not be construed as affecting any permit or valid existing right-of-way heretofore granted or as confirming or otherwise affecting any claim, or as affecting any authority heretofore given pursuant to law, but any person, association, corporation,

State, or municipality holding or possessing such permit, right-of-way, or authority may apply for a license hereunder, and upon such application the Commission may issue to any such applicant a license in accordance with the provisions of this Part and in such case the provisions of this Act shall apply to such applicant as a licensee hereunder: *Provided,* That when application is made for a license under this section for a project or projects already constructed the fair value of said project or projects determined as provided in this section, shall for the purposes of this Part and of said license be deemed to be the amount to be allowed as the net investment of the applicant in such project or projects as of the date of such license, or as of the date of such determination, if license has not been issued. Such fair value shall be determined by the Commission after notice and opportunity for hearing.

(b) It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act. Any person, association, corporation, State, or municipality intending to construct a dam or other project works

across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws.

* * * * *

SEC. 27. That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

* * * * *

SEC. 29. That all Acts or parts of Acts inconsistent with this Act are hereby repealed: *Provided,* That nothing herein contained shall be held or construed to modify or repeal any of the provisions of the Act of Congress approved December 19, 1913, grant-

ing certain rights of way to the city and county of San Francisco, in the State of California: *Provided further,* That section 18 of an Act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes, approved August 8, 1917, is hereby repealed.

* * * * * *

Code of Iowa, Chapter 363, Mill Dams and Races:

7767 PROHIBITION—PERMIT. No dam shall be constructed, maintained, or operated in this state in any navigable or meandered stream for any purpose, or in any other stream for manufacturing or power purposes, nor shall any water be taken from such streams for industrial purposes, unless a permit has been granted by the executive council to the person, firm, corporation or municipality constructing, maintaining, or operating the same. (R60, § 1264; C73, § 1188; C97, § 1921; C24, 27, 31, 35, § 7767)

7768 APPLICATION FOR PERMIT. Any person, firm, corporation or municipality making application for a permit to construct, maintain, or operate a dam in any of the waters, including canals, raceways, and other constructions necessary or useful in connection with the development and utilization of the water or water power, shall file with the executive council a written application, which shall contain the following information:

1. The name of the navigable, meandered, or other stream in or across which a dam is maintained or it is proposed to construct a dam or other obstruction, and a

description of the site for such dam, including the name or names of the riparian owners of the site.

2. The purpose for which the dam is maintained or for which it is proposed to maintain the same, including the use to which the water is to be put.

3. A general description of the dam, raceways, canals, and other constructions, including the specifications as to the material and plan of construction and a general description of all booms, piers, and other protection works which are constructed in connection therewith, or which it is proposed to erect in connection therewith.

4. The approximate amount of hydraulic power that the dam is capable of developing and the amount of power to be used.

5. A map or blue print on a scale of not less than four inches to the mile, showing the lands that are or may be affected by the construction, operation, or maintenance of the dam, and the ownership of each tract of land within the affected area.

6. Such additional information as may be required by the executive council. (R60, § 1265; C73, §§ 1188, 1189; C97, § 1921; C24, 27, 31, 35, § 7768.)

* * * * *

7771 WHEN PERMIT GRANTED. If it shall appear to the council that the construction, operation, or maintenance of the dam will not materially obstruct existing navigation, or materially affect other public rights, will not endanger life or public health, and any water taken from the stream in connection with the project is returned thereto at the nearest practicable place without being materially diminished

in quantity or polluted or rendered deleterious to fish life, it shall grant the permit, upon such terms and conditions as it may prescribe. (R60, § 1269; C73, §§ 1193, 1198; C97, § 1930; C 24, 27, 31, 35, § 7771).

7772 CERTIFICATE OF APPROVAL. No permit shall be granted for the construction or operation of a dam where the water is to be used for manufacturing purposes, except to develop power, until a certificate of the state department of health has been filed with the council showing its approval of the use of the water for the purposes specified in the application. (C24, 27, 31, 35, § 7772.)

* * * * *

7776 CONSTRUCTION AND OPERATION. The executive council shall investigate methods of construction, reconstruction, operation, maintenance, and equipment of dams, so as to determine the best methods to conserve and protect as far as possible all public and riparian rights in the waters of the state and so as to protect the life, health, and property of the general public; and the method of construction, operation, maintenance, and equipment of any and all dams in such waters shall be subject to the approval of the executive council. (C24, 27, 31, 35, § 7776.)

* * * * *

7778 DUTY TO ENFORCE STATUTES. It shall be the duty of the council to require that all existing statutes of the state, including the provisions of this chapter, with reference to the construction of dams, shall be enforced. (C24, 27, 31, 35, § 7778.)

* * * * *

7796 STATE LANDS. Whenever the erection of any such dam will affect highways or state-owned lands, the applicant shall as a condition precedent secure a permit from the board, commission, or other official body charged with jurisdiction over and control of said highways or state-owned lands. (C24, 27, 31, 35, § 7796.)

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 603

FIRST IOWA HYDRO-ELECTRIC COOPERATIVE,
PETITIONER

v.

FEDERAL POWER COMMISSION

STATE OF IOWA, INTERVENOR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE FEDERAL POWER COMMISSION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia (R. 43–61) is reported in 151 F. 2d 20. The opinion and order of the Federal Power Commission (R. 8–14) are reported in 52 P. U. R. (NS) 82.

JURISDICTION

The judgment of the Court of Appeals was entered on August 14, 1945 (R. 61–62). The petition for a writ of certiorari was filed on November

13, 1945, and was granted on January 2, 1946 (R. 71). The jurisdiction of this Court rests upon Section 313 (b) of the Federal Power Act (49 Stat. 860, 16 U. S. 825*l*) and Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The petitioner applied to the Federal Power Commission for a license to construct, operate, and maintain a power project in Iowa, on a navigable water of the United States. Section 9 (b) of the Federal Power Act requires that an applicant submit to the Commission "satisfactory evidence that the applicant has complied with the requirements of the laws of the State * * * with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act." The petitioner made no showing of any attempt to comply with Sections 7767, 7771, and 7776 of Chapter 363 of the Iowa Code of 1939 and sought to excuse its failure on the ground that the state statutory provisions were either inapplicable or invalid, as applied to the proposed project, having been superseded by the Federal Power Act. The State of Iowa intervened and urged that the application be denied because petitioner had not been

granted a permit by the State Executive Council. The Commission denied the petitioner's application without prejudice to renewal within one year upon satisfying the requirements of Section 9 (b), and the court below affirmed. The questions presented are:

1. Whether the Commission correctly held that it could not issue a license to the petitioner in the light of petitioner's failure to adduce evidence of compliance with Sections 7767, 7771, and 7776 of the Iowa Code.

2. Whether the court below properly refused to pass upon the constitutional validity of Chapter 363 of the Iowa Code of 1939, and properly remitted the petitioner to its state remedies.

3. Whether, if this Court reaches the question of the validity of the provisions of Chapter 303 of the Iowa Code of 1939, those provisions, as construed by the Attorney General of Iowa with reference to the proposed project, are unconstitutional.

STATUTES INVOLVED

The pertinent provisions of the Federal Power Act (June 10, 1920, c. 285, 41 Stat. 1063, as amended August 26, 1935, c. 687, 49 Stat. 838, 16 U. S. C. 791a–825r) may be found in a pamphlet copy of the Act submitted with this brief, and the pertinent provisions of Chapter 363 of the Iowa Code, are set forth in Appendix A, *infra*, pp. 59–61.

STATEMENT

Upon a declaration of intention to construct a hydroelectric power development on the Cedar River in the State of Iowa, filed by petitioner under Section 23 (b) of the Federal Power Act, the Commission found, after investigation, that the Cedar River and the Iowa River into which it flows are navigable waters of the United States (R. 10, note) and that the proposed project would affect the navigable capacity of the Mississippi River and the interests of interstate commerce. *First Iowa Hydro-Electric Cooperative,* 2 F. P. C. 958, 959, 960.

Thereafter, on August 11, 1941, petitioner filed an application for a license under Section 4 (e) of the Act (R. 1–8), and subsequently filed supplements to the application modifying the project in certain particulars (R. 10). The project for which a license ultimately was sought consisted of a dam across the Cedar River, some twenty-one river miles above and north of its confluence with the Iowa River, and about fifty river miles above and northeast of the confluence of the latter with the Mississippi River, and a diversion canal to carry the water about eight miles from the reservoir created by the dam on the Cedar River eastwardly to a power plant through which the water would be discharged into the Mississippi River, about twenty-five river miles above and north of the point at which the Iowa River flows

into the Mississippi (R. 10–11, 31–33; for map, see Tr. 2957, not printed but in the original transcript on file with the Clerk). The modified project included changes suggested by the Chief of Engineers of the War Department (R. 11). By these modifications of the original design, it was proposed that the water of the Cedar River, instead of being discharged downstream past the dam, so as to develop power from a fall of approximately thirty-five feet, would be discharged into the Mississippi, with a fall of about 101 feet to produce almost three times as much power.

The application[1] filed by petitioner had attached to it an Exhibit C stating that "there are no valid laws which are applicable to the building and operation of the project", other than those referring to public highways; an Exhibit D, stating, with respect to public property and compliance with state highway and bridge laws, that applicant had obtained permits from the Iowa State Highway Commission (dated May 29, 1940), the Muscatine County Board of Supervisors (dated August 1, 1940), and the Cedar

[1] This application appears at R. 1–8, and the exhibits attached thereto may be found in the original transcript on file with the Clerk. For the convenience of this Court, we have reprinted the exhibits relating to compliance with state law as Appendix B to this brief, *infra*, pp. 64–76. See also the Commission's Rules of Practice and Regulations with reference to a showing of compliance with state law in the application for a license. Appendix A, *infra*, pp. 62–63.

County Board of Supervisors (dated May 3, 1940); and an Exhibit E, stating that applicant owned no water rights on August 8, 1941, but contemplated obtaining the necessary water rights by purchase and condemnation, that applicant has contracts with the Federal Construction Company under which it would acquire "practically all of the riparian rights to all of the land on the Cedar River from the site of the primary diversion dam and extending to the junction of the Cedar and Iowa Rivers", that applicant's counsel advised that "there is no provision in the state law by which he may obtain the use of water for diversion of the Cedar River to the Mississippi and that no valid state law exists which is applicable to his project", and that "Applicant has complied with all state requirements such as those referring to Public Highways, Public Property and Public Health."

At the hearings (R. 20–29) on the application, the State of Iowa intervened (Tr. 6)[1] and objected to the issuance of the license on the ground, *inter alia*, that petitioner had not met the requirements of Section 9 (b) of the Federal Power Act in that it had failed to submit "evidence of compliance" with Chapter 363 of the Iowa Code prohibiting construction of a dam "in any navigable or meandered stream for any purpose, or in any

[1] The unprinted transcript of the record as filed in this Court is referred to as "Tr."

other stream for * * * power purposes," unless a permit has been granted by the State Executive Council (Section 7767, Appendix A, *infra*, p. 59).[3] The state statute provides that such a permit shall be issued only if it appears to the Executive Council that, among other things, the dam "will not materially obstruct existing navigation * * *, and any water taken from the stream in connection with the project is returned thereto at the nearest practicable place without being materially diminished in quantity" (Section 7771, Appendix A, *infra*, p. 60).

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[3] The Iowa State Executive Council consists of the Governor of the State, the Secretary of State, the Auditor of State, the Treasurer of State, and the Secretary of Agriculture. See Iowa Official Register—1943–1944, p. 156; Code of Iowa 1939, c. 18, sec. 276. The Iowa Official Register for 1943–1944 lists its duties as follows (p. 156): "Among the duties placed upon the Executive Council by the laws of Iowa, are the following: to purchase all stores, supplies and furniture for state departments and officers; the execution of contracts for fuel, lights, repairs; the approval of articles of incorporation and by-laws of building and loan associations, and plan for liquidation of said associations; the custody of supplies for state officers and commissions; the canvass of votes cast for state and district officers; the declaration of changes in classification of cities; the assignment of office rooms to state officers; the appointment of the board of examiners of mine inspectors; the approval of plans for buildings at the state educational institutions, under certain conditions; and the determination of the value at which property may be taken by Iowa corporations and the amount of stock which may be issued on account thereof. The secretary of the Executive Council is also secretary of the Conservation Commission and of the Board of Engineering Examiners."

Petitioner admitted that it had not applied for a permit from the Iowa Executive Council for the amended project, but contended that it was not required to obtain such a permit in order to satisfy the requirements of Section 9 (b) of the Federal Power Act. It contended that no permit could be issued under the Iowa statute, because the authority of the Executive Council is limited to the "waters of the State" (R. 18) whereas the waters of the Cedar River are navigable waters of the United States, and because an essential element of the proposed project was the diversion of waters from the Cedar River through a canal to the Mississippi River (R. 12). It further contended that if the State of Iowa's interpretation of the statute is the correct one, and a State Executive Council permit is required for the project, Chapter 363 of the Iowa Code (particularly Sections 7767, 7771 and 7776 thereof (R. 17, 18)), as so interpreted, is unconstitutional, because the States would then be legislating on matters over which Congress has "plenary control" and such state legislation is superseded as being in direct conflict with the authority vested by Congress in the Federal Power Commission by the enactment of the Federal Power Act under the "Federal Government's authority over navigable waters of the United States" (R. 13).

The State of Iowa, the Iowa Electric Light and Power Company, and other protesting partici-

pants in the proceeding before the Commission (R. 8–10) contended that Chapter 363 of the Iowa Code was valid and that the requirement of an Iowa State Executive Council permit was applicable to the proposed amended project.[4]

The Commission, by its opinion and order of January 29, 1944, found that petitioner had not "presented satisfactory evidence, pursuant to Section 9 (b) of the Federal Power Act, of compliance with the requirements of applicable laws of the State of Iowa requiring a permit from the State Executive Council to effect the purposes of a license under the Federal Power Act" (R. 14). Therefore, although finding that the proposed project called for "a practical and reasonably adequate development" (R. 11), the Commission dismissed the application for license "without prejudice to renewal within one year upon satisfying the requirements of Section 9 (b) of the Federal Power Act" (R. 14). While the Commission was of the opinion that it was "bound by the requirements" of Section 9 (b) of the Act, it stated that "the appropriate place for a determination of the validity of such state laws is in the courts and, if we dismiss the application * * * applicant may seek review of our action and its contentions under Section 313 (b) of the Federal Power Act" (R. 13). On March 7, 1944, the Com-

[4] Substantially similar briefs were filed by the State and the Iowa Electric Light and Power Company.

mission denied petitioner's application for rehearing filed pursuant to Section 313 (a) (R. 14–19, 20).

A petition for review, naming only the Commission as respondent, was then filed in the court below, pursuant to Section 313 (b) of the Federal Power Act (R. 29–36), and the State of Iowa filed a motion for leave to intervene (R. 37–40) which was granted (R. 41). Iowa's motion, filed by the Attorney General pursuant to a resolution of the Executive Council (R. 39–40), quotes the Iowa Code provisions requiring permits for dams and prohibiting diversion (Sections 7767 and 7771, Appendix A, *infra*, pp. 59, 60) and states that (R. 38): "By reason of said provisions of law and the diversion of water involved in the proposed project of petitioner, the executive council of the state of Iowa could not lawfully grant a permit for the erection of the dam proposed."

In the court below, the Commission took the position that, as an administrative agency, it had properly dismissed the application for license and declined to consider the constitutional question (R. 48, note 15); but it argued that the court could and should determine that question. In response to the intervenor's contention that the States had authority, under the Federal Power Act, to veto the licensing of power projects and that Chapter 363 of the Iowa Code prohibited the petitioner's

proposed project,[5] the Commission further took the position that Section 9 (b) of the Federal Power Act did not require that the applicant submit "evidence of compliance" with an unconstitutional state law, and that Chapter 363 of the Iowa Code insofar as it would prohibit construction of this project so conflicted with the Federal Power Act as to be superseded thereby (R. 48–49).

The court below affirmed the Commission's order (R. 72–73) declining to pass upon the validity of the Iowa Statute (R. 47). Observing that the constitutional question presented "is a difficult one" (R. 49), the court held that the petitioner should have assumed the constitutionality of the state law, applied for the state permit, and pursued such remedies as might be available in the State to establish its rights to issuance of the state permit,[6] and, that until it had done so, it

[5] In its brief in the court below, the intervenor argued that "Congress * * * has been zealous to insure that it will not authorize or license the construction of any obstruction in a stream within a State * * * unless that project also is approved by the State" (p. 24) and that project construction was dependent upon joint or concurrent federal and state assent (p. 7).

[6] Action of the Executive Council as an administrative body is reviewable in the Iowa courts by certiorari. *Lloyd v. Ramsay*, 192 Iowa 103, 116–117. Statutory provision is made for issuance of the writ of certiorari in such cases by c. 533, Sec. 12456 of Iowa Code 1939, now superseded by Division XIV, Sec. 306 of the Rules of Civil Procedure of the State of Iowa, c. 278 of Laws of the Fiftieth General Assembly, Iowa, p. 347. This reviewing power would ap-

was in no position to challenge the order of the Commission, which was based upon its failure to do so. The court avoided the issue of constitutionality on the ground that it could not say that the state statute was not "susceptible of any reasonable interpretation consistent with constitutionality", since, in the absence of an Iowa court decision, there were possible interpretations of the Iowa statute under which a state permit could be granted for the project (R. 47–48). The court's opinion made clear, however, that Congress, by enacting the provisions of Section 9 (b) as part of the Federal Power Act, did not intend to require state consent to hydroelectric developments or to give the States a veto power over them (R. 55). But the court felt that, on the facts presented to it, there had been no showing that the Iowa law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" and hence, that "the Commission, properly, insisted upon a good faith effort, by its applicant, to comply with the state law" (R. 61).

SUMMARY OF ARGUMENT

I

The plain language of Section 9 (b) of the Federal Power Act indicates its applicability to

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pear to encompass the power to pass on the constitutional validity of the statute under which the executive council acts. Cf. *Weed* v. *Boston*, 172 Mass. 28, 29.

the permit requirements of Chapter 363 of the Iowa Code. While the legislative history of Section 9 (b) indicates that state property laws were intended to be within the purview of Section 9 (b), there is no evidence that Section 9 (b) was to be confined to such laws and a good deal of evidence pointing toward a broader reach.

Chapter 363 of the Iowa Code is applicable on its face to petitioner's proposed project and the Commission properly refused to hold the state law inapplicable in order to save its provisions from alleged conflict with the Federal Power Act.

In the absence of any judicial determination of the validity of Chapter 363 of the Iowa Code and in the light of the prevailing doubt as to the power of an administrative agency to decide constitutional questions (see *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144, 153), the Commission did not commit reversible error when it refused to pass on the constitutional validity of the Iowa law, and its order, denying petitioner's application for a license, was proper.

II

While the court below had power to decide the constitutional question sought to be raised, there is a reasonable ground for its discretionary refusal to do so, and we think that its judgment, remitting the petitioner to its state remedies, should be affirmed. In the absence of any light

from the Iowa courts on the meaning and scope of Chapter 363 of the Iowa Code, the Court of Appeals' disposition of this case comports with well-established principles of comity, and effectuates the obvious Congressional purpose, evidenced in Section 9 (b), to secure cooperation in this field between federal and state governments.

III

If this Court reaches the question of the constitutionality of Chapter 363 of the Iowa code as interpreted by Iowa to prohibit petitioner's project, the issues to be considered are whether Congress intended, by Section 9 (b), to provide for such exercise of state power and, if not, whether such state action is superseded by the other provisions of the Federal Power Act.

Both Iowa and the court below implicitly admit that whatever state laws are superseded by Part I of the Act are not "saved" by Section 9 (b), and this is confirmed by the differences between that Section and Section 27, a clear "saving clause"; by the latitude in Section 9 (b) for administrative discretion; and by the clear purpose of the Section to elicit needed information.

Under the test of supersedure formulated by the lower court, the Iowa code provisions, as applied by the State to prohibit petitioner's proposed project, are superseded by the Federal Power Act because that prohibition is aimed at the very ele-

ment of the proposed project which is essential to the full development of water resources sought by Congress. This does not mean that local needs and state legal standards are overridden, for there are ample provisions for administrative accommodation of the proposed project and the license therefor to local conditions, and careful statutory provisions defining liabilities of the licensee to protect local interests.

The State of Iowa's contention that there is no conflict between the state prohibition and the provisions of the Federal Power Act rests upon too narrow a conception of the purpose of that Act as shown by its legislative history and the affirmative nature and comprehensive scope of its provisions.

The state prohibition applicable here being invalid, it is unnecessary to decide the question of the severability thereof from the rest of the Iowa permit statute. Section 9 (b) affords ample latitude of discretion within which the Commission may decline to compel petitioner to make the repeated applications and engage in the extended litigation which may be necessary to determine finally which, if any, severable portion of the Iowa statute can be held constitutional. At the same time, Section 306 of the Act amply safeguards all legitimate interests of the State.

ARGUMENT

I

The Commission properly dismissed petitioner's application without prejudice to renewal when the requirements of Section 9 (b) of the Federal Power Act were met

Section 7767 of Chapter 363 of the Iowa Code of 1939 requires that a permit be secured from the Executive Council of the State before any dam may be "constructed, maintained, or operated in this State in any navigable or meandered stream for any purpose," and Section 7771 describes the circumstances under which a permit will issue. Appendix A, *infra*, pp. 59, 60. In the absence of any judicial judgment of the invalidity of these state laws, we submit that there can be no doubt as to the propriety of the Federal Power Commission's dismissal of petitioner's application for a license for failure to present "satisfactory evidence, pursuant to Section 9 (b) of the Federal Power Act, of compliance with the requirements of applicable laws of the State of Iowa requiring a permit from the State Executive Council" (R. 14), unless the provisions of Chapter 363 of the Iowa Code were not of the type to which Section 9 (b) was intended to apply or were plainly inapplicable to the petitioner's project.

A. *The provisions of Chapter 363 of the Iowa Code of 1939 fall within the purview of Section 9 (b) of the Federal Power Act.*—Section 9 of the Federal Power Act requires that "each applicant

for a license hereunder shall submit to the commission—

> (b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act.

Section 7771 of Chapter 363 of the Iowa Code provides that a permit may be granted

> If it shall appear to the council that the construction, operation, or maintenance of the dam will not materially obstruct existing navigation, or materially affect other public rights, will not endanger life or public health, and any water taken from the stream in connection with the project is returned thereto at the nearest practicable place without being materially diminished in quantity or polluted or rendered deleterious to fish life, it shall grant the permit, upon such terms and conditions as it may prescribe.

On its face, then, Section 7771, like Section 7767 (Appendix A, *infra*, p. 59), is a state law "with respect to * * * the appropriation, diversion, and use of water for power purposes and

with respect to the right to engage in the business of developing, transmitting and distributing power" within the meaning of Section 9 (b) of the Federal Power Act. *United States* v. *West Virginia*, 295 U. S. 463, 473.

Apparently contending that the Iowa laws in issue are not within the scope of Section 9 (b) because they are not state laws relating to property rights in bed and banks or water, or relating to the right to engage in the power business (Br. 28–36), petitioner ignores the provisions in Section 7767, with respect to the right to engage in the business of constructing, maintaining, and operating a dam for any purpose,[7] and, more im-

[7] *E. g.*, The Commission has given effect to the provisions of Section 9 (b) requiring satisfactory evidence that the applicant has complied with the requirements of the laws of the State within which the proposed project is to be located "with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act" by denying an application for a license, because the applicant had not complied with the laws of the State of Missouri, by securing from the Public Service Commission of Missouri a certificate of convenience and necessity for construction of the project under Section 5193 of the Revised Statutes of the State of Missouri 1929, requiring such a certificate for any construction by a gas corporation, electrical corporation or water corporation. *Gasconade River Power Co.*, 1 F. P. C. 424–427. The Commission has also refused approval of the transfer of a license because of failure of the applicant to submit satisfactory evidence of approval by the Public Service Commission of South Carolina of the sale and transfer of all the properties and franchises, including the license to the applicant, "as necessary to effect the

portant," forgets that "While one may not end with the words of a disputed statute, one certainly begins there." *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, 350. Petitioner passes lightly over the words of Section 9 (b) and their apparent applicability to the permit requirements of the Iowa law to rely, primarily, on the legislative history of Section 9 (b). Typical of the legislative material upon which its argument is based is Representative LaFollette's statement before the House (56 Cong. Rec. 9110), that, in Section 9 (b), we are "insisting that the State's rules of property as to water, bed, and banks must have have been fully complied with or license can not issue." But the statements referred to, all of this sort, persuasively show only that state property laws were intended to be covered by Section 9 (b); they do not even tend to show that Section 9 (b) applied to no other state laws relating to "the appropriation, diversion, and use of water for power purposes."

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purposes of a license." *Broad River Power Co.* & *Lexington Water Power Co.*, 1 F. P. C. 363, 364–365. The files of the Commission show that the Commission Secretary has indicated that the Commission would withhold issuance of a license for a project in West Virginia because the laws of West Virginia provide "that no permit to use any part of bed or banks of a stream in this State, or to construct and maintain any power dam or other structures thereon shall be granted except to a corporation created and organized for such purposes under the laws of this State", and because the prospective applicant was not organized in the State of West Virginia.

That Section 9 (b) is broader in scope than petitioner suggests is made clear by Representative Mondell's statements, with respect to Section 9 (b), that the "bill provides that all provisions of the [state] law, whatever they may be, shall have been complied with up to that time" when application is made for a federal license (56 Cong. Rec. 9813), and that the Section serves to notify "the commission that they must proceed in accordance with the State laws, which they must do in any event, whether the provision were in the bill or not." 56 Cong. Rec. 9814. It does not follow that Section 9 (b) grants to the States a veto power over hydroelectric projects on navigable streams in the sense of saving all state laws that might otherwise be superseded by the Federal Power Act and requiring compliance with all such laws (see *infra*, pp. 37–42); but Section 9 (b) does require a showing of compliance with laws like Chapter 363 of the Iowa Code to the extent that such laws are applicable to the project and if such laws are not so inconsistent with the policies and purposes of the Federal Power Act as to have been superseded by that Act.[8] See *infra*, pp. 30–57.

[8] The Commission has rescinded its authorization for issuance of a license upon a showing that the licensee had failed to obtain a construction permit from the Wisconsin Railroad Commission. See *Wisconsin Power & Light Co., Project No. 710*, Seventh Annual Report, Federal Power Commission (1927), p. 134.

B. *Chapter 363 of the Iowa Code is applicable to petitioner's proposed project.*—No argument is needed to show that Chapter 363 of the Iowa Code is, in terms, applicable to the project which petitioner proposes to construct. See Section 7767, Appendix A, *infra*, p. 59. Petitioner's basic contention in this respect, however, is that to save the constitutional validity of Chapter 363, it should and must be construed as inapplicable to a project on a water of the United States, Br. 19.* But constitutional doubts as to state law can hardly serve as a sturdy foundation upon which a federal commission, or even a federal court, may properly read the words "navigable or meandered stream" in Section 7767 to mean "waters of the state" and not "navigable waters of the United States" (R. 17). As the court below stated (R. 45):

> * * * While this is a possible interpretation and one which the State might adopt concerning the streams here involved—especially if it were necessary to do so in order to avoid the challenge of unconstitutionality—we are unable to adopt it, in the absence of a decision to that effect by the

* Petitioner argued below that the diversion provisions in Section 7771 (Appendix A, *infra*, p. 60) apply only to diversion for industrial and not for power purposes. The court below pointed out that there is nothing in the Iowa law to support this view and much against it (R. 45–46), and petitioner has, apparently, acquiesced in that conclusion.

> Iowa courts. Each of the disputed Sections speaks in terms of *navigable* waters. In view of the fact that both State and Federal governments may legislate concerning such waters—each in its own appropriate sphere—we see no reason to give to Chapter 363 the narrow interpretation for which petitioner contends. * * * *

Much the same considerations which moved the Commission to refuse to pass upon the validity of the Iowa Code apply to this question of applicability. We shall, therefore, turn to the Commission's treatment of the constitutional issue.

C. *The Commission's refusal to pass on the validity of Chapter 363 did not constitute an abuse of discretion.*—In the absence of any judicial decision on the constitutional validity of Chapter 363 of the Iowa Code, the Commission felt constrained to assume its legitimacy and to hold that "the appropriate place for a determination of the validity of such State laws is in the courts" (R. 13). As we shall indicate, *infra*, pp. 24–30, it is our position that even the court below, reviewing the Commission's order in this case, did not abuse its discretion in refusing to pass on the validity of the Iowa law here involved. The reasons which lead us to this conclusion serve as well to support the order of the Commission itself.

But, beyond this, administrative agencies have, rather consistently, doubted their power to decide

constitutional questions,[10] and this Court, in *Davies Warehouse Co. v. Bowles*, 321 U. S. 144, 153, said that:

> State statutes, like federal ones, are entitled to the presumption of constitutionality until their invalidity is judicially declared. Certainly no power to adjudicate constitutional issues is conferred on the [Price] Administrator. * * * We think the Administrator will not be remiss in his duties if he assumes the constitutionality of state regulatory statutes, under both state and federal constitutions, in the absence of a contrary judicial determination.

Whether the Federal Power Commission would, under the circumstances of this case,[11] have the power to decide the constitutional issue is a question which need not now be resolved. It is enough

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[10] Compare *Panitz v. District of Columbia*, 112 F. 2d 39, 41–42 (App. D. C.); *Engineers Public Service Co. v. Securities and Exchange Commission*, 138 F. 2d 936, 951–953 (App. D. C.), certiorari granted, Nos. 2 and 3, this Term. See also *In the Matter of Walston & Co.*, 5 S. E. C. 112, 113 (1939); *In the Matter of East Ohio Gas Co.*, 1 F. P. C. 586, and cases cited; *In the Matter of Patterson and the State of Ohio*, United States Civil Service Commission, January 4, 1943, Docket No. 3, Pike & Fischer, Admin. Law, 48f.117. But cf. *In the Matter of White and Weld*, 3 S. E. C. 466.

[11] This case is different from the *Davies Warehouse* case in at least one important respect. Here the constitutional question turns on an alleged conflict between state law and a federal act administered by the Commission itself. In the *Davies Warehouse* case, the state law, if invalid, would be so under the general provisions of the Due Process Clause.

if this Court can say, as we think it can, that the Commission's refusal to decide the validity of the Iowa law was not an abuse of its discretion.

II

The affirmance of the Commission's order by the court below was not an abuse of discretion

In its opinion in this case (R. 13), the Commission suggested that the "appropriate place for a determination of the validity" of the state law "is in the courts", and we submit that there can be no doubt that the court below had the power, in its discretion, to consider and pass upon that question. *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 489. Petitioner, as a "party aggrieved" by the Commission's order, had asked that the order be set aside (and intervenor that it be affirmed) and under Section 313 (b) of the Federal Power Act, the court had "exclusive jurisdiction to affirm, modify, or set aside such order." An illustrative analogy is found in a comparison of the scope of administrative decision and judicial review, when objections to the constitutionality of a statute are made in a proceeding before the agency charged with the administration of the statute and on judicial review of the agency's order. Whatever requirement there may be that the agency assume the constitutionality of the statutory provisions (see *supra*, note 10) in no wise restricts the power of the reviewing court to consider and pass upon the constitutional

question. *E. g.*, compare *Mississippi River Fuel Corporation*, 2 F. P. C. 170, 175, 34 P. U. R. (NS) 8, with the same case on review 121 F. 2d 159, 162 (C. C. A. 8). On review, petitioner "can come into court * * * because he urges errors of law outside the Commission's final say-so." *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 133–134.[12]

However, the Court of Appeals affirmed the Commission's order, declining on grounds of comity to decide the question of constitutional validity of the Iowa statute as applied to the proposed project, saying that there are "possible interpretations" of Chapter 363 which might enable the Iowa courts to avoid holding the law unconstitutional (R. 47–48, 50).

One of these "possible interpretations" which the lower court said the courts of Iowa might adopt was one which it had itself, earlier in its opinion, declined to adopt on its own responsibility (see *supra*, pp. 21–22), viz., that Chapter 363 is inapplicable to the proposed project because "navigable streams" as used in Section 7767 might be held to exclude "navigable waters of the United States" (R. 47). Another "possible interpretation" was that the diversion of the waters of the Cedar River and their discharge into the

[12] "The court has power to pass judgment upon challenged principles of law insofar as they are relevant to the disposition made by the Commission." *Federal Power Commission* v. *Pacific Power & Light Company*, 307 U. S. 156, 160.

Mississippi might be held to be a return "at the nearest practicable place" within the meaning of Section 7771, Appendix A, *infra*, p. 60, presumably because the water ultimately will flow down the Mississippi at and below the point some fifty river miles below the dam, where it would go if allowed to flow naturally down the Cedar and Iowa Rivers into the Mississippi. The third and last "possible interpretation," which, to us, seems more to resemble legislative amendment than judicial interpretation, was that a state court might "so interpret the first Section [Section 7767, Appendix A, *infra*, p. 59] as to allow the issuance of a permit without strict compliance with all its terms." (R. 48).

In the court below, the Commission stated that "the question of the validity of the State statute was properly before the Court for determination" (R. 65), and that the Iowa statute, as construed by the State Attorney General to prohibit construction of the proposed project, was invalid because so in conflict with the Federal Power Act as to be superseded by its provisions. But the court below did not reach the constitutional question, and since we recognize that there is room for reasonable doubt as to the proper approach to be taken, we are not inclined, on this review, to quarrel with the lower court's discretionary refusal to decide whether the Iowa state law has

been superseded by the Federal Power Act in any respect.[13] Cf. *Meredith* v. *Winter Haven*, 320 U. S. 228, 235–236; *United States* v. *Bank of New York Co.*, 296 U. S. 463, 480. On application by the petitioner for a state permit, the Executive Council of Iowa may make decision of the constitutional question unnecessary by either granting

[13] We cannot, however, defend the view of the court below that "the Commission's order must stand" for the "reason alone" that "nothing appears in the record to excuse petitioner's failure to comply with Section 7796" (R. 57) which provides that:

"Whenever the erection of any such dam will affect highways or state-owned lands, the applicant shall as a condition precedent secure a permit from the board, commission, or other official body charged with jurisdiction over and control of said highways or state-owned lands."

The Commission has not placed its decision upon this ground whether because the showing which had been made of compliance with Section 7796 was satisfactory, under Section 9 (b) (see Exhibit D and the state permits attached, Appendix B, *infra*, pp. 64–75) in view of the impracticability of requiring a further showing prior to the issuance of the license, or for some other reason. See *infra*, pp. 39–40. This being so, an affirmance of the Commission's order on grounds not taken by the Commission would violate the rule laid down by this Court in *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80, 95, in which the Court said: "* * * an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." "For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency." 318 U. S. at 88.

the application or denying it on a ground wholly unrelated to the Federal Power Act and the constitutional question of supremacy;[14] even if the Executive Council itself does not take such action, moreover, an appropriate state court may eliminate the constitutional question on review.[15]

By holding that Section 9 (b) requires a good faith effort to comply with the provisions of state law (R. 72) and that petitioner should assume their constitutionality,[16] apply for a state permit, and pursue such remedies as may be available in the State to establish its right to issuance of the permit (R. 48), the lower court has not only moved in the direction of effectuating the cooperation of state and federal agencies contemplated by Congress in the Federal Power Act but has

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[14] *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 545, 546; *Railway Express Agency, Inc.* v. *Virginia*, 282 U. S. 440, 441; *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608; *Lehon* v. *City of Atlanta*, 242 U. S. 53, 56.

[15] *Bachtel* v. *Wilson*, 204 U. S. 36; *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 546; *St. Louis Southwestern Railway Co.* v. *Arkansas*, 235 U. S. 350, 368, 369. As to the judicial remedies open to petitioner in Iowa, see *supra*, note 6, p. 11.

[16] We assume that the court did not intend, by saying that petitioner "must assume their constitutionality" (R. 48), to deny to petitioner the right to make such reservations in applying for a permit as may be necessary to enable it to raise in the courts of the State the constitutional questions which it sought to present below. Cf. *Schenley Distillers Corporation, et al.* v. *United States, et al.*, No. 560, this Term, decided January 2, 1946, slip opinion, p. 3.

also accorded appropriate observance to the well-established general principles of comity.[17]

That petitioner may, in some respects, be required to "serve two masters" (cf. Pet. Br. 22–24) if the ruling of the court below is sustained, is not a consummation wholly unintended by Congress. Unless Section 9 (b) is to be given no effect whatever, some evidence of compliance with at least some state laws is a prerequisite to the issuance of a federal license, and the view of the court below, that there is no occasion, in this case, to anticipate conflicts between state and federal authority and the consequent invalidity of the state law, is not an unreasonable one. "To predetermine, even in the limited field of water power, the rights of different sovereignties, preg-

[17] *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496, 500–501; *Spector Motor Co.* v. *McLaughlin*, 323 U. S. 101; *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450; *Asbury Hospital* v. *Cass County*, No. 35, this Term, decided November 5, 1945, slip opinion, pp. 4–5; *Great Lakes Co.* v. *Huffman*, 319 U. S. 293, 300–302; *Watson* v. *Buck*, 313 U. S. 387, 401–404; *Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168, 171–173. But cf. *Markham* v. *Allen*, No. 60, this Term, decided January 7, 1946, in which an exercise of federal jurisdiction to decide the validity of a state statute, although state proceedings were pending, was justified by reference to the legislative policy evidenced in Section 17 of the Trading with the Enemy Act. See also *Township of Hillsborough* v. *Cromwell*, No. 305, this Term, decided January 28, 1946, slip opinion, pp. 4, 7, in which the state remedies appeared to be inadequate and the court was not wholly unaided, as it is here, by authoritative state constructions of the state statute.

nant with future controversies, is beyond the judicial function." *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, 423. Here petitioner, since the modification of its plans,[18] has given the State Executive Council and the Iowa courts no opportunity to express their views on its proposed project with reference to matters which may be peculiarly of local concern; without such an expression, it is difficult to assess the propriety of what is only an anticipated exercise of the State's power.

III

If this Court reaches the question of the constitutional validity of Chapter 363 of the Iowa Code, that Chapter, as applied to petitioner's project, should be held to be superseded by the Federal Power Act

The Federal Power Commission, in this case, is not in the usual position of an administrative agency before the revewing courts, seeking merely to sustain its order. It contends that it correctly disposed of the case, but its opinion doing so makes plain (R. 13) that it regarded such disposition as an intermediate one which would provide a basis for obtaining an authoritative judicial decision on the constitutional validity of the Iowa statute.

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[18] The Executive Council twice refused to issue the petitioner a permit for the construction of the originally proposed single river development which did not involve the diversion of water from the Cedar River to the Mississippi River (Tr. 30, 2999).

As we have pointed out (*supra*, pp. 24–30), we think that the lower court could have decided that question, but that its refusal to do so in the absence of a decision by the courts of Iowa was within the sound exercise of its discretion. However, the Attorney General of Iowa, in his motion to intervene, filed pursuant to a special resolution of the Executive Council (the agency charged with the administration of the state law) (R. 39–40), interpreted the Iowa statute as prohibiting the proposed project because of the contemplated diversion of water from the Cedar River (38). If that interpretation, not yet adopted by the Iowa courts, is clearly correct—if the other "possible interpretations" of Chapter 363 of the Iowa Code are not really acceptable—the question of the constitutional validity of the Iowa Code provisions as applied to the proposed project is presented for decision.[19] Accordingly, the following

[19] Section 9 (b) of the Federal Power Act does not require an applicant for a license to submit evidence of compliance with an invalid state law. *Poindexter* v. *Greenhow*, 114 U. S. 270, 301–306; cf. *United States* v. *Bellingham Bay Boom Co.*, 176 U. S. 211, 215–216; *Porter* v. *Investors Syndicate*, 287 U. S. 346, 347; *Norton* v. *Shelby County*, 118 U. S. 425, 442.

Section 313 (b) of the Federal Power Act specially confers upon the federal circuit courts of appeals and upon the court below a power to "affirm, modify, or set aside" an order of the Commission on petition of "any party to a proceeding under this Act aggrieved by" such order. This jurisdiction is granted "independently of the statutes governing generally jurisdiction of federal courts" (*Markham* v. *Allen*, No. 60, this Term, decided January 7, 1946, slip opinion, p. 4),

discussion of that question is submitted for the Court's assistance in case the question is reached.

Any discussion of the constitutional validity of a state law which depends upon the question of supersedure by the Federal Power Act must begin with what this Court has said with respect to the validity of the Federal Power Act as a broad exercise of the commerce power and with regard to the specific provisions in the Act for the exercise of state powers. *United States* v. *Appalachian Electric Power Company*, 311 U. S. 377.

In that case, the Company contended that the Federal Power Commission was attempting to impose upon it "a license containing unlawful conditions" (311 U. S. at p. 402). Forty-one states joined as *amici* in support of the Company's arguments, insisting that the power of Congress to prohibit the erection in navigable waters of the United States of any structure deemed to impair navigation "does not comprehend a power to exact conditions, which are unrelated to navigation, for the permission to erect such structures", that the imposition of such conditions would cause the States "to lose control of their resources", and

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and in the absence of any special circumstances which would warrant a refusal to exercise it", the refusal of the court below to decide the validity of Chapter 363 serves "to penalize [the petitioner] for resorting to a jurisdiction which [it was] entitled to invoke." *Meredith* v. *Winter Haven*, 320 U. S. 228, 237.

"that a clash of sovereignty arises between the license provisions of the Power Act and state licensing provisions" (311 U. S. at pp. 421–422). The contentions of the State of Virginia, one of the *amici,* are stated as follows (311 U. S. at pp. 422–423):

> The Commonwealth of Virginia advances forcibly its contention that the affirmative regulation of water-power projects on its navigable streams within its boundaries rests with the state, beyond that needed for navigation. "While the supremacy of the Federal Government in its own proper sphere, as delineated in the Constitution, is cheerfully conceded, yet just as earnestly does Virginia insist upon the supremacy of her own government in its proper field as established by that instrument." Virginia has a Water Power Act. It, too, offers a fifty-year license, with the right to use the natural resources of the state, the stream flow and the beds of the water courses for the period of the license or its extensions subject to state condemnation at any time on Virginia's terms for ascertainment of value. Operation is likewise regulated by state law. The Commonwealth objects that the development of its water power resources is subjected to Federal Power Act requirements such as are detailed above in stating the respondent's objection, even to the point that Virginia itself may not build and operate a dam in

> gated power which under the Tenth Amendment remains in the state or the people. The water power statutes of the United States and of Virginia recognize the difficulties of our dual system of government by providing, each in its own enactments, for the exercise of rights of the other.

The federal statutory provisions for the exercise of state powers cited by the Court were Sections 10 (e), 14 and 19 of the Federal Power Act (311 U. S. 377, 429, note 94). Those Sections provide respectively for federal expropriation "of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves"; for preservation of the right of the States "to take over, maintain, and operate any project licensed under this Act at any time by condemnation proceedings"; and for state regulation of licensee's rates and service to the public, with federal regulation of such rates and service by licensees and by customers of licensees and of securities issued by licensees only until such time as "the State shall have provided a commission or other authority for such regulation and control".

The State of Iowa's contention in this case that Section 9 (b) provides "that the States and National Government should participate jointly in the development and regulation of water power

projects"[20] is an attempt to add that Section to the three cited by the Court. However, Iowa bases its attempts to do so, not on the constitutional ground referred to by this Court in the *Appalachian* case, *supra*, pp. 35–36, but on the statutory ground that by Section 9 (b) Congress must be held to have shared with the States its responsibility and power over waters within a State. It seeks to support its contention by arguing that the purpose of Congress in the enactment of the Federal Power Act, as in the earlier River and Harbor Acts, was limited to the prevention of obstructions to navigable waters of the United States and except where a state permit purports to authorize what is prohibited under the Federal Power Act (Intervenor's Resistance to Petition, p. 19), there is no such repugnancy or conflict as to result in supersedure of the action of the State by federal action.[21]

The exception which intervenor admits to its argument, recognizes, as we think must be recognized, that Section 9 (b) does not require a showing of compliance with a state law which is superseded by the Federal Power Act and was not intended to "save" such state laws from being superseded. The lower court took the same view when it said that it was not the purpose of Congress to require state "consent to the construction

[20] Pp. 13–14, Intervenor's Resistance to Petition for Writ of Certiorari.

[21] *Idem*, pp. 15–19.

and operation of such projects, or to give[22] to the states, a veto power over them" (R. 55).

Confirmation of the conclusion that Section 9 (b) was not intended to "save" state laws, or to require a showing of compliance with state laws which would otherwise be superseded, is found in the fact that the Act contains Section 27, obviously intended to cover the relationship of the Act to state legislation. It is apparent, from a consideration of that Section, that Congress recognized that the usual rules of supersedure would apply to any state laws in conflict with the new federal act and therefore that it was necessary to include explicit provisions to "save", in case of conflict, those state laws which Congress wanted to leave in effect. The state laws so "saved" were strictly limited in that Section to laws relating to "control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses" of the same nature. *Alabama Power Company* v. *Gulf Power Company,* 283 Fed. 606 (M. D. Ala.).[23]

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[22] The lower court thus necessarily recognized that such state laws were not "saved" by Section 9 (b), notwithstanding its statement that Section 9 (b) "just as effectively 'saves' state laws 'with respect to bed and banks [of streams] and [with respect] to the appropriation, diversion and use of water for power purposes' as does Section 27 with respect to laws 'relating to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses.'" (R. 54).

[23] In that case, which involved the constitutionality of the condemnation provision of Section 21 of the Federal Water

The terms of Section 9 (b) indicate that it was intended for a different purpose. It provides, not that compliance with the state laws is a prerequisite to a right to a federal license,[24] but that the applicant shall submit evidence of compliance

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Power Act, it had been contended that the provisions of the Federal Water Power Act were an invasion of the rights of the State, preserved by Section 27 (among other Sections). The court overruled the constitutional objections, restricting the application of Section 27 to state laws relating to uses of water for "irrigation" and "municipal" uses and other uses of the same nature saying (283 Fed. at 619, 620):

"* * * a proper construction of the Act requires that the words "other uses" shall be construed ejusdem generis with the words "irrigation" and "municipal". The rule is that, when in a statute general words follow a designation of particular subjects or classes, the meaning of the general words will ordinarily be presumed to be restricted by the particular designation. * * * The only apparent exception to this rule is the case where the legislative language has completely exhausted the particular description, which is then followed by words of general import. This, however, is a recognition of the ejusdem generis rule rather than the exception, since all rules of construction require the courts to give some meaning to every word or clause used in the statute if possible. * * *"

A restricted construction of Section 27 is supported by the legislative history of that Section which shows that it was derived from Section 8 of the Reclamation Law of 1902, c. 1093, 32 Stat. 390, 43 U. S. C. 383. See the reprint in Appendix to the Petition for Certiorari, pp. 58–60, of our discussion of the legislative history of the Federal Power Act with particular reference to Sections 9 (b) and 27, originally printed as an appendix to our brief below.

[24] Earlier versions had so provided. See the summary of legislative history taken from our brief in the court below and printed as an appendix to the Petition for Certiorari, pp. 52–56.

"satisfactory" "to the Commission," thus cushioning the requirement within the latitude of the Commission's discretion. Obviously, such discretion is not to be reduced to nothingness by reading the Section as requiring actual state consent to every hydroelectric project; it is to be given a substance often measured by the Commission's needs in administering the Act. And see *infra*, note 25.

In further contrast to Section 27, which expressly precludes any supersedure of the state laws enumerated therein, Section 9 (b) is literally a provision merely for the submission of information by an applicant.[25] Without it, the Commission might be handicapped in satisfying the practical need for information that the applicant has complied, or is in a position to comply, with the state laws enumerated therein. This need arises, particularly, from the provision of Section

[25] Representative Mondell gave two controlling reasons for the inclusion of Section 9 (b) during the debates in the House:

"The first, from the standpoint of water power legislation, is that the water power commission shall have the benefit of all of the information which the states possess relative to the condition of water supply at the point of proposed diversion * * *. The second reason is so that the bill shall carry with it notice to the Commission that they must proceed in accordance with the State laws, *which they must do in any event, whether the provision were in the bill or not*" (56 Cong. Rec. 9813–9814; italics supplied).

It is noteworthy that the last clause confirms the conclusion that Section 9 (b) requires compliance only with such state laws as would be in effect if there were no Section 9 (b); *i. e.*, that Section 9 (b) is not a "saving clause."

7, as to an applicant's ability to carry out a proposed development, and Section 13, limiting construction time. Information thus obtained is also important to enable the Commission to work out a practical accommodation of license provisions to the needs and legal standards which obtain in the localities involved. Often on the basis of such data, the States and the Federal Commission are able to come to mutually satisfactory agreements; cooperation between state and federal agencies has marked the twenty-five-year period during which the Federal Power Act has been in existence.[25]

[25] In addition to the requirements of Section 9 (b), the Act explicitly requires the Commission to give notice of applications for licenses to any State or municipality likely to be interested or affected and to publish notice once each week for four weeks in a newspaper published in the county or counties in which the project and any lands affected are located (Sections 4 (f) and 4 (e)). The Commission's practice of notification is illustrated by the notices given in the instant case which included, in addition to newspaper publication, the sending of written notice to the following: Governor of Iowa, Chairman County Board of Supervisors, Muscatine County, Muscatine, Iowa; Chairman, County Board of Supervisors, Cedar County, Tipton, Iowa; State Board of Conservation, Des Moines, Iowa; Iowa Railroad Commission, Des Moines, Iowa; The Mayor, Muscatine, Iowa; The Mayor, Tipton, Iowa; The Mayor, Wilton, Iowa; The Mayor, West Liberty, Iowa; Senators Guy M. Gillette and Clyde L. Herring and Representative Thomas E. Martin, of Iowa.

As a result of representations received in response to such notices and the data received pursuant to Section 9 (b), the Commission is enabled to write into licenses provisions accommodating local needs and legal standards. Two examples shown by the Commission's files may be cited:

Upon consideration of an application by Safe Harbor

These practical needs for information rather than any intention to save state laws which would otherwise be superseded by the Federal Power Act show the real purpose of the subsection. Any other construction would subject federal licensing to the requirement of actual state consent, a requirement which the legislative history of the Act clearly indicates Congress did not intend,[11] and one which the lower court disclaimed (R. 55).

Construing Section 9 (b), therefore, as requiring compliance with valid state laws of the kinds

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Water Power Corporation for a license for a project on the Susquehanna River about eight miles from Holtwood, Pennsylvania, it appeared that local inhabitants were interested in a bridge across the river at that point and the Commission required, as a condition of the Federal license, agreement by the licensee to grant a right-of-way across its project works and lands for a highway bridge or ferry.

A license issued to Florida Power Corporation for a project on the Ocklocknee River was drawn, after numerous and protracted exchanges of views and conferences with the Florida authorities, to require the licensee to "comply with all lawful requirements by the Florida State Board of Health for the protection of the public health through the control" of the breeding of malarial mosquitoes.

In connection with a situation of the type presented by *New Jersey* v. *Sargent*, 269 U. S. 328, see *Public Papers of Governor Alfred E. Smith* (1923), pp. 557, *et seq.*; *State of New York* v. *Daugherty*, 266 U. S. 642. See also Merrill, *Federal Versus State Jurisdiction over Power Development and its Supervision*, 129 Annals of the American Academy of Political and Social Science (January 1927), p. 132.

[11] A provision expressly requiring state consent was deleted from the bill, and several amendments which would have so provided were rejected. See the summary of legislative history taken from our brief in the court below and reprinted in the Appendix to the Petition for Certiorari, pp. 52–56.

therein described, and not as saving those state laws which would otherwise be superseded, we reach the question whether Chapter 363 of the Iowa Code of 1939, as interpreted by Iowa with reference to petitioner's project, is superseded by the Federal Power Act. For that purpose, we need not question the general formulation of the principles governing the decision of questions of supersedure, which the lower court suggested (R. 60-61):

> The test, then, is not whether a state law happens to block action which a Federal agency may chance to approve. Instead, it is whether the state law frustrates the operation of the Federal law, prevents accomplishment of its purpose, refuses to its provisions their natural effect [citing *Savage* v. *Jones,* 225 U. S. 501, 533; *Asakura* v. *Seattle,* 265 U. S. 332; *Hines* v. *Davidowitz,* 312 U. S. 52, 67]; whether, in short, the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress [citing *Hines* v. *Davidowitz,* 312 U. S. 52, 67; *Cloverleaf Butter Co.* v. *Patterson,* 315 U. S. 148, 157; cf. *Hill* v. *Florida* [325 U. S. 538]]. If it does, then it must yield.

In addition to the cases cited, see *Southern Pacific Company* v. *Arizona,* 325 U. S. 761, 783; *Northwestern Electric Company* v. *Federal Power Commission,* 321 U. S. 119, 125; *Kelly* v. *Washington,* 302 U. S. 1, 10.

Under that test, it is pertinent to inquire whether the state statute, in prohibiting the proposed project, does so upon the basis of facts and under circumstances in which Congress intended, by the Federal Power Act, to encourage development of hydroelectric projects. That it does, appears from the fact that Iowa bans the project because "any water taken from the stream in connection with the project is [not] returned thereto at the nearest practicable place" (R. 38, see Section 7771 of Chapter 363 of the Iowa Code, Appendix A, *infra*, p. 60), while such diversion is essential to the development of water resources contemplated by the Federal Power Act. The Commission found that the "present plans call for a practical and reasonably adequate development to utilize the head and water available, create a large storage reservoir, and make available for recreational purposes a considerable area now unsuitable for such use, all at a cost which does not appear to be unreasonable", only after the originally proposed development had been changed by the addition of the diversion canal and relocation of the power plant so as to utilize the 101-foot fall of the water obtainable by discharging into the Mississippi instead of the 35-foot fall obtainable on the Cedar River (R. 11). The Commission's opinion (R. 11) says that "further changes in design may be desirable, but they are minor in character", thus indicating that the project will then meet the statutory standard, *i. e.* "will be

best adapted to a comprehensive plan for improving and developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement or utilization of waterpower development, and for other beneficial public uses, including recreational purposes". Section 10 (a) of the Federal Power Act.

In contrast to the prohibition in the state statute, the federal act tends to encourage, among other things, whatever may be found to be the most efficient power development, by providing broadly that "improvement and utilization of water power development" is one of the several objectives to be realized by the issuance of licenses. If diversion to another channel will achieve a greater utilization of natural resources, the federal act encourages the accomplishment of that end by setting up as one of the criteria for the guidance of the Commission the development, conservation and utilization of the navigation and power "water resources of the region". (Sections 4 (g) and 7 (a)).

If sanitary conditions or the preservation of fishlife in the natural channel downstream from the dam warrants a requirement for maintenance of some flow of water down the natural channel, even at the price of a slight curtailment of water power development due to the lesser fall of water available there, the Commission's authority, under Section 10 (a), "to require the modification" of the project and, under Section 10 (g), to provide

other conditions, will enable it to work out accommodations of the project and the license therefor to local needs and state legal standards so as to secure that end by some minor changes, such as the opinion refers to, without sacrificing the whole project, as a blanket statutory prohibition against diversion would.[28]

Furthermore, the interests of riparian owners and others in downstream conditions, which a prohibition against diversion may be argued in some fashion to protect, are safeguarded under the Federal Power Act in additional ways, as for example, by the statutory provisions that the licensee "shall conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health, and property" and that the licensee "shall be liable for all damages occasioned to the property of others" (Section 10 (c)). This includes water rights of others. *Henry Ford and Son, Inc.* v. *Little Falls Fibre Co.*, 280 U. S. 369, 378. In fact, however, petitioner has already obtained options for 98% of the riparian rights between the dam and the Iowa River (Tr. 555, 560–561).

Iowa's view that the state law, as applied to prohibit the proposed project, is not superseded unless it authorizes an obstruction to navigation which the Federal Power Act prohibits (Intervenor's Resistance to Petition, p. 19), takes too

[28] Similarly as to the needs of navigation, which are provided for in Sections 11 and 12 of the Federal Power Act.

narrow a view of the purpose of the federal act, as shown by the legislative history of the act and by the *Appalachian Electric Power Co.* decision already referred to (*supra*, pp. 32–36).

The contention (Intervenor's Resistance to Petition, p. 16) that Congress intended to do no more in the Federal Power Act than in the River and Harbor Act of 1899, which was relatively limited in scope and largely negative in character, ignores a whole chapter of American history—the movement for conservation of natural resources. The Federal Water Power Act of June 10, 1920, now Part I of the Federal Power Act, was the outgrowth of a long debated, widely supported effort of the "conservationists" to secure enactment of a complete scheme of national regulation which would affirmatively encourage and promote the comprehensive development and utilization of the water resources of the Nation, insofar as it was within the reach of the federal power to do so, instead of the piecemeal, restrictive, negative approach of the River and Harbor Acts and other federal laws previously enacted.

Hydroelectric power developments first made their appearance around 1890, prior to which time water power had been used to a limited extent for the generation of mechanical energy. Insofar as hydroelectric developments involved obstructions in navigable waters of the United States, they came within the general terms of the River and Harbor Acts of 1890 and 1899, under which it

was necessary in most instances to secure a special act of Congress, as well as the approval of the Secretary of War and the Chief of Engineers. As a result, Congress passed numerous special acts authorizing such developments. Except for a general provision that they were subject to amendment or repeal by subsequent acts of Congress, the rights thus granted were perpetual in their term and largely without restriction. See Kerwin, *Federal Water Power Legislation*, (1926); Pinchot, *The Long Struggle for Effective Federal Water Power Legislation*, 14 Geo. Wash. L. Rev., 9; and First Annual Report, Federal Power Commission (1921).

The inadequacy of this negative approach to the development of the nation's hydroelectric resources soon became apparent, and by the Dam Act of June 21, 1906 (34 Stat. 386), Congress took the first step toward an affirmative policy by prescribing certain conditions to attach to all authorizations which might thereafter be granted by special acts. Public insistence upon a comprehensive Federal policy with respect to the development of the nation's water power resources continued to increase and came to a head when President Theodore Roosevelt vetoed the Rainy River bill in April 1908 and the James River bill in January 1909 (Sen. Doc. 438, 60th Cong., 1st Sess.; H. Doc. 1350, 60th Cong., 2nd Sess.). Beginning in 1914, numerous bills were introduced to provide for regulation of hydroelectric

developments on navigable waters and similar bills were introduced with respect to such developments on the public domain.* The conservation movement received added impetus when the first World War showed the national importance of a proper development and utilization of our water power resources.

The long-continued Congressional deadlock with respect to the necessary legislation was broken when President Wilson, in January 1918, brought about the creation of a special water power committee in the House of Representatives to consider a combined bill for the regulation of all hydroelectric developments on streams subject to Federal jurisdiction as well as on the public domain. Such a bill was prepared by the Secretaries of War, Interior and Agriculture to provide for "a constructive national program of intelligent, economical utilization of our power resources" and to provide "a method by which the water powers of the country, wherever located, can be developed by public or private agencies under conditions which will give the necessary security to the capital invested and at the same time protect and preserve

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* See the bills cited in the discussion of the legislative history of Sections 9 (b) and 27, taken from our brief below and printed in the Appendix to the Petition for Certiorari, pp. 52–56.

Hydroelectric developments on the public domain had been authorized by permits issued by the Secretary of the Interior under the Act of February 15, 1901 (31 Stat. 790), and in the national forests by the Secretary of Agriculture under the Act of March 4, 1911 (36 Stat. 1235, 1253).

every legitimate public interest" (H. Rep. No. 61, 66th Cong., 1st Sess., pp. 2, 3, 5). After extended legislative consideration, the evolution of a comprehensive and affirmative Federal policy with respect to our water resources culminated in the passage of the Federal Water Power Act of June 10, 1920.

The intention of Congress to secure and promote a comprehensive development of the nation's water resources, and not merely to prevent obstructions to navigation, is apparent from the provisions of the Act, the statutory scheme of which has been several times reviewed and approved by the courts.[20] Perhaps most noteworthy among the provisions to affirmatively encourage development by private interests were the provisions of Section 6 for a fixed license term of not to exceed fifty years and of Section 28 against any legislative amendment or repeal of a license, providing that

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[20] *New Jersey* v. *Sargent*, 269 U. S. 328; *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377; *Clarion River Power Co.* v. *Smith*, 59 F. 2d 861 (App. D. C.), certiorari denied, 287 U. S. 639; *Alabama Power Co.* v. *McNinch*, 94 F. 2d 601 (App. D. C.); *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 123 F. 2d 155 (App. D. C.), certiorari denied, 315 U. S. 806; *Alabama Power Co.* v. *Federal Power Commission*, 128 F. 2d 280 (App. D. C.), certiorari denied, 317 U. S. 652; *Puget Sound Power & Light Co.* v. *Federal Power Commission*, 137 F. 2d 701 (App. D. C.); *Wisconsin Public Service Corp.* v. *Federal Power Commission*, 147 F. 2d 743 (C. C. A. 7), certiorari denied, 325 U. S. 880–881; *Georgia Power Company* v. *Federal Power Commission* (C. C. A. 5), decided January 7, 1946.

security of tenure necessary to obtain proper financing of projects which had been lacking under the River and Harbor Acts; and the provisions of Sections 4 (f) and 5 for preliminary permits to enable applicants to perfect their applications for license.

Other provisions show the broad scope and affirmative nature of the Act. Thus, by Section 10 (a), Congress specifically provided that the projects licensed under Section 4 (e) should be those projects which, in the judgment of the Commission, are "best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes". Congress further granted to the Commission, in Section 10 (a), the authority to require the modification of any project and its plans before approval, if necessary to secure such comprehensive development. The Act also provides, in section 7 (a), that as between conflicting applicants, the Commission may give preference to the applicant whose plans it finds are best adapted to develop, conserve, and utilize, in the public interest, the water resources of the region. Moreover, under Section 7 (b), if the Commission finds that the development of any water resources for public purposes should be undertaken by the

United States itself, the Commission is directed not to approve any application for a project affecting such development but to make the necessary investigation and submit its recommendations to Congress.

The affirmative nature of the statute is further indicated by the provisions of Section 13, requiring prompt construction of a proposed project and providing for termination or revocation of the license if this is not done. See *Arkansas Power & Light Company* v. *Federal Power Commission*, 125 F. 2d 982 (C. C. A. 8). To facilitate construction of licensed projects, Section 21 of the Act makes provision for the exercise of the Federal power of condemnation by licensees.

In addition to these provisions with respect to licenses,[11] Section 4 (g) of the Act authorizes the Commission, upon its own motion, to investigate any occupancy or intention to occupy, for the purpose of developing electric power, any public lands or bodies of water subject to congressional jurisdiction and to issue such orders "as it may find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water-power resources of the region." *Pennsylvania Water and Power Company* v. *Federal Power Commission*, 123 F. 2d 155 (App. D. C.), certiorari

[11] Under Section 10 (g) of the Act, the Commission also has authority to prescribe any conditions in the license "not inconsistent with the provisions" of the Act.

denied, 315 U. S. 806; cf. *Wisconsin Public Service Corp.* v. *Federal Power Commission*, 147 F. 2d 743 (C. C. A. 7), certiorari denied, 325 U. S. 880–881; *Georgia Power Company* v. *Federal Power Commission* (C. C. A. 5), decided January 7, 1946.

It is thus clear that, contrary to the contention of the State (Intervenor's Resistance to Petition, p. 16), the Federal Power Act is not a narrowly limited, "negative," enactment, like the River and Harbor Act of 1899, but is a complete scheme of regulation intended to secure and promote the comprehensive development of water resources subject to Federal control, in the public interest.

Intervenor's view of the purpose of Part I of the Federal Power Act as limited to the protection of navigation against obstruction is essentially the same narrow view as that rejected by this Court in the *Appalachian Electric Power Co.* case (311 U. S. at 426):

> * * * The fact that the Commission is willing to give a license for a power dam only is of no significance in appraising the type of conditions allowable. It may well be that this portion of the river is not needed for navigation at this time. Or that the dam proposed may function satisfactorily with others, contemplated or intended. It may fit in as a part of the river development. The point is that navigable waters are subject to national planning and

> control in the broad regulation of commerce granted the Federal Government. The license conditions to which objection is made have an obvious relationship to the exercise of the commerce power. Even if there were no such relationship the plenary power of Congress over navigable waters would empower it to deny the privilege of constructing an obstruction in those waters. It may likewise grant the privilege on terms. It is no objection to the terms and to the exertion of the power that "its exercise is attended by the same incidents which attend the exercise of the police power of the states." [Citing: *United States* v. *Carolene Products Co.*, 304 U. S. 144, 147; Cf. *Mulford* v. *Smith*, 307 U. S. 38, 48.] The Congressional authority under the commerce clause is complete unless limited by the Fifth Amendment.

These being the purposes of the Federal Power Act, the Iowa statute, as interpreted to bar petitioner's project, clearly cannot "be reconciled or consistently stand" with it. *Kelly* v. *Washington*, 302 U. S. 1, 10. The opinion of this Court in *United States* v. *West Virginia*, 295 U. S. 463, 473, which spoke of the grant of a state license as a "prerequisite to the application for the federal license" is perfectly consistent with this conclusion. The Court there had reference to a state license under a statute which, far from prohibiting a federally licensable project on any ground,

provided that "nothing contained in this act shall be construed to interfere with the exercise of the jurisdiction by the government of the United States over navigable streams". The opinion refers to that provision of the West Virginia statute (295 U. S. at 472) and makes clear that in the bill which was there dismissed, there had been no allegation of any "act or threat of interference by the State * * * with the exercise of the authority claimed by the United States * * * no allegation that the State * * * has issued any permit which is incompatible with the Federal Water Power Act." The Court concluded "* * * the mere grant of the state license, which the Federal Water Power Act makes prerequisite to the application for the federal license, cannot be said to involve any infringement of federal authority. It does not appear that the State has done more."

The care taken in that opinion to make clear that the state statute did not stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (*supra*, p. 43), confirms the conclusion that the Iowa statute involved in this case, as interpreted to prohibit the project otherwise licensable under the Federal Power Act, is superseded by the Federal Power Act, not "saved" by Section 9 (b), and that a showing of compliance therewith should not be required.

The Iowa prohibition of petitioner's project seems to be based primarily on provisions of Section 7771 with respect to diversion (see Appendix A, *infra*, p. 60). Such an application of Section 7771 operates to negate federal power for no reason which is peculiarly a matter of legitimate state concern and which outweighs the federal interests protected by the Federal Power Act. Cf. *Southern Pacific Company* v. *Arizona*, 325 U. S. 761, 783. That being so, we think the provision, as applied, is void.

While there is a serious question as to the severability of this portion of Section 7771 from the remainder of Chapter 363 of the Iowa Code (see Pet. Br. 19, note 7) that question need not now be decided. Section 9 (b) affords ample authority to the Commission to decline to require one in petitioner's position to make repeated attempts to comply with a state law which has been held invalid in part; if the contrary were true, there might be no end to the applications to the State, subsequent litigation through the federal courts, decisions holding the state ground for denial of a permit unsustainable,[22] and a repeated

[22] The Iowa statute would be equally in conflict with the Federal Power Act if deemed to prohibit petitioner's proposed project for the reason that it would "materially obstruct existing navigation." See Section 7771, Appendix A, *infra*, p. 60.

application to the State. Should Iowa have legitimate objections to petitioner's project, it may, at any time, utilize Section 306 of the Federal Power Act to bring that matter to the Commission's attention.[35] This Court should leave to the Commission the task of determining what further action would be appropriate to the disposition of this cause.

CONCLUSION

For the reasons stated in Points I and II of this brief, the judgment below should be affirmed. If, however, this Court deems it appropriate to decide the constitutional validity of Chapter 363 of the Iowa Code as applied to petitioner's project, it should hold the diversion provisions of Section 7771 of that Chapter unconstitutional and

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[35] Section 306 provides that:

"Any person, State, municipality, or State commission complaining of anything done or omitted to be done by any licensee or public utility in contravention of the provisions of this Act may apply to the Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such licensee or public utility, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such licensee or public utility shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating such complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall find proper."

order the case remanded to the Commission for further proceedings.

Respectfully submitted,

J. HOWARD MCGRATH,
Solicitor General.

BRADFORD ROSS,
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Assistant General Counsel,

LOUIS W. MCKERNAN,
Principal Attorney,
Federal Power Commission.

MARCH 1946.

APPENDIX A

Code of Iowa, 1939, Chapter 363, Mill Dams and Races:

7767 PROHIBITION—PERMIT. No dam shall be constructed, maintained, or operated in this state in any navigable or meandered stream for any purpose, or in any other stream for manufacturing or power purposes, nor shall any water be taken from such streams for industrial purposes, unless a permit has been granted by the executive council to the person, firm, corporation, or municipality constructing, maintaining, or operating the same. (R60, § 1264; C73, § 1188; C97, § 1921; C24, 27, 31, 35, § 7767.)

7768 APPLICATION FOR PERMIT. Any person, firm, corporation, or municipality making application for a permit to construct, maintain, or operate a dam in any of the waters, including canals, raceways, and other constructions necessary or useful in connection with the development and utilization of the water or water power, shall file with the executive council a written application, which shall contain the following information:

1. The name of the navigable, meandered, or other stream in or across which a dam is maintained or it is proposed to construct a dam or other obstruction, and a description of the site for such dam, including the name or names of the riparian owners of the site.

2. The purpose for which the dam is maintained or for which it is proposed to

maintain the same, including the use to which the water is to be put.

3. A general description of the dam, raceways, canals, and other constructions, including the specifications as to the material and plan of construction and a general description of all booms, piers, and other protection works which are constructed in connection therewith, or which it is proposed to erect in connection therewith.

4. The approximate amount of hydraulic power that the dam is capable of developing and the amount of power to be used.

5. A map or blue print on a scale of not less than four inches to the mile, showing the lands that are or may be affected by the construction, operation, or maintenance of the dam, and the ownership of each tract of land within the affected area.

6. Such additional information as may be required by the executive council. (R60, § 1265; C73, §§ 1188, 1189; C97, § 1921; C24, 27, 31, 35, § 7768.)

* * * * *

7771 WHEN PERMIT GRANTED. If it shall appear to the council that the construction, operation, or maintenance of the dam will not materially obstruct existing navigation, or materially affect other public rights, will not endanger life or public health, and any water taken from the stream in connection with the project is returned thereto at the nearest practicable place without being materially diminished in quantity or polluted or rendered deleterious to fish life, it shall grant the permit, upon such terms and conditions as it may prescribe. (R60, § 1269; C73, §§ 1193, 1198; C97, § 1930; C24, 27, 31, 35; § 7771.)

7772 CERTIFICATE OF APPROVAL. No per-

mit shall be granted for the construction or operation of a dam where the water is to be used for manufacturing purposes, except to develop power, until a certificate of the state department of health has been filed with the council showing its approval of the use of the water for the purposes specified in the application. (C24, 27, 31, 35, § 7772.)

* * * * *

7776 CONSTRUCTION AND OPERATION. The executive council shall investigate methods of construction, reconstruction, operation, maintenance, and equipment of dams, so as to determine the best methods to conserve and protect as far as possible all public and riparian rights in the waters of the state and so as to protect the life, health, and property of the general public; and the method of construction, operation, maintenance, and equipment of any and all dams in such waters shall be subject to the approval of the executive council. (C24, 27, 31, 35, § 7776.)

* * * * *

7778 DUTY TO ENFORCE STATUTES. It shall be the duty of the council to require that all existing statutes of the state, including the provisions of this chapter, with reference to the construction of dams, shall be enforced. (C24, 27, 31, 35, § 7778.)

* * * * *

7796 STATE LANDS. Whenever the erection of any such dam will affect highways or state-owned lands, the applicant shall as a condition precedent secure a permit from the board, commission, or other official body charged with jurisdiction over and control of said highways or state-owned lands. (C24, 27, 31, 35, § 7796.)

The Rules of Practice and Regulations of the Federal Power Commission (1938) provide, in pertinent part, as follows:

> SEC. 4.41. REQUIRED EXHIBITS.—There shall be filed with the application for license and as a part thereof the following exhibits, certified in conformity with Sec. 200.4:
>
> * * * * * *
>
> *Exhibit C.*—If special hydroelectric water-power, or irrigation laws of the State or States involved pertain to the construction of the applicant's project, submit copies of such laws or reference thereto. (General State incorporation acts are not desired.)
>
> *Exhibit D.*—Evidence that the applicant has complied with the requirements of the laws of the State or States within which the project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business, necessary to effect the purposes of the license applied for, including a certificate of convenience and necessity, if required. This evidence shall be accompanied by a statement of the steps that have been taken and the steps that remain to be taken to acquire franchise or other rights from States, counties, and municipalities before the project can be completed and put into operation.
>
> *Exhibit E.*—The nature, extent, and ownership of water rights which the applicant proposes to use in the development of the project covered by application, together with satisfactory evidence that the applicant has proceeded as far as practicable

in perfecting its rights to use sufficient water for proper operation of the project works. A certificate from the proper State agency setting forth the extent and validity of the applicant's water rights shall be appended if practicable. In case the approval or permission of one or more State agencies is required by State law as a condition precedent to the applicant's right to take or use water for the operation of the project works, duly certified evidence of such approval or permission, or a showing of cause why such evidence cannot be reasonably submitted shall also be filed. When a State certificate is involved, one certified copy and three uncertified copies shall be submitted.

APPENDIX B

EXHIBIT C

APPLICATION FOR LICENSE BY FIRST IOWA HYDRO ELECTRIC COOPERATIVE

Statement re state laws applicable to project

There are no valid state laws which are applicable to the building and operation of the project as covered by this application, other than those referring to Public Highways and more fully described in Exhibit "D".

VERIFICATION

The above statement has been read by me and is a true and correct statement of the facts to the best of my knowledge and belief.

H. J. STRONG,
Secretary,
First Iowa Hydro Electric Cooperative.

Date: August 8, 1941.

EXHIBIT D

APPLICATION FOR LICENSE BY FIRST IOWA HYDRO ELECTRIC COOPERATIVE

Statement re compliance with state laws

Applicant has procured the following permits from the respective State Agencies having jurisdiction:

1. Permit from Iowa State Highway Commission dated May 29th, 1940, granting applicant

right to make necessary alterations in State Highway. Copy of said permit is attached and forms a part of this Exhibit.

2. Permit from Muscatine County Board of Supervisors granting applicant right to make necessary changes in highway, bridges and public property coming within their jurisdiction, dated August 21st, 1940. Copy of said permit is attached and forms a part of this Exhibit.

3. On May 3rd, 1940, the Cedar County Board of Supervisors passed a Resolution agreeing to grant applicant the right to make the necessary changes in County Highways and public property coming within their jurisdiction. Final permit was issued on July 28th, 1941. Copy of said permit is attached and forms a part of this Exhibit.

VERIFICATION

The above statement has been read by me and is a true and correct statement of the facts to the best of my knowledge and belief, and I hereby certify that the attached are true and correct copies of the above mentioned permits.

H. J. STRONG,
Secretary,
First Iowa Hydro Electric Cooperative.

Date: August 8, 1941.

EXHIBIT D-1

IOWA STATE HIGHWAY COMMISSION

Permit

Whereas, the First Iowa Hydro Electric Cooperative of Muscatine, Iowa, has through its

Secretary, H. J. Strong, expressed its desire to construct a dam in the Cedar River in Sections Two (2) and Three (3) Township Seventy-Seven (77) North, Range Three (3) West of the Fifth (5th) Principal Meridian in Muscatine County, Iowa, commonly known as the "Moscow Dam" and has advised this Commission that when said dam is closed the water level of the Cedar River will be raised to such extent that certain changes will be necessary in the public highway known as "U. S. Road No. 6" which crosses the Cedar River Valley about one-half mile south of the village of Moscow, Iowa, and

Whereas, the said U. S. Road No. 6 is a part of and included in the primary road system of the State of Iowa and is therefore under the control and jurisdiction of the Iowa State Highway Commission, and

Whereas, the said First Iowa Hydro Electric Cooperative of Muscatine, Iowa, has by its Secretary filed application with the Iowa State Highway Commission for a permit under the provisions of Section 7796 of the 1939 Code of Iowa, to make or cause to be made such changes in said U. S. Road No. 6 as may be necessary because of the construction of said Moscow Dam, and

Whereas, data filed with the Iowa State Highway Commission by the said First Iowa Hydro Electric Cooperative indicates that at the maximum elevation of the pool proposed to be created by the said Moscow Dam, and at maximum flood stage of the said Cedar River, the said present U. S. Road No. 6 crossing the Cedar River Valley will be inundated to a maximum depth of

about six feet and that approximately two miles of said road will be so inundated,

Now therefore, Be It Resolved By The Iowa State Highway Commission,

I. That a permit is hereby given to the said First Iowa Hydro Electric Cooperative to reconstruct and raise said U. S. Road No. 6 across the Cedar River Valley near the village of Moscow in Muscatine County, Iowa.

II. That this instrument shall constitute the permit contemplated by Section 7796 of the Code of 1939, and is granted solely in consideration that the First Iowa Hydro Electric Cooperative shall agree to and shall perform and shall conform to the following conditions and requirements:

a. Said highway shall remain on the present location and alignment.

b. The said highway and highway structures thereon, or pertinent thereto, shall be raised and reconstructed to such elevation that the travelled surface at the center of the roadway shall at no point be less than five (5) feet above the surface of the water in the pool or reservoir at its maximum height, and at maximum flood stage of said Cedar River.

c. The plans, specifications and contracts for the raising and reconstruction of said highway and structures shall be subject to approval by, and all construction work shall be under the direct supervision of the Iowa State Highway Commission and shall conform to recognized standards of construction for highway and highway structures as adopted by the American Association of

State Highway Officials and the general specifications of the Iowa State Highway Commission.

d. Before starting any construction work on the said Moscow Dam the First Iowa Hydro Electric Cooperative shall deposit with the Iowa State Highway Commission or the Treasurer of the State of Iowa, $300,000.00, which shall be used to pay the cost of raising and reconstructing said highway and highway structures, the providing surfacing and maintaining of an adequate surfaced detour for use of the travelling public during the progress of reconstruction, and all other expense incident to the raising and reconstruction of said highway and structures; it being understood and agreed that said fund may not be withdrawn, nor any part thereof diverted to any other purpose until the raising and reconstruction of said highway and structures is completed and approved by the Highway Commission and all costs incident thereto fully paid from said fund so deposited.

e. Should the completed cost of raising and reconstructing the highway and highway structures referred to herein be less than the sum of $300,000.00 the residue of the funds so deposited shall be returned to the First Iowa Hydro Electric Cooperative; and on the other hand, should such raising and reconstruction exceed said sum of $300,000.00 so deposited, then and in that event, the First Iowa Hydro Electric Cooperative agrees to pay the Iowa State Highway Commission on demand the full amount of said excess.

III. That it is fully understood and expressly intended that the approvals and supervision of all

work pertaining to the raising and reconstruction of said highway and highway structures is for the purpose only of securing and assuring conformity with recognized standards of highway construction, and that neither the Iowa State Highway Commission nor the State of Iowa is participating in any of such construction or expenditures made therefor in such manner and to such extent as to incur liability to any person or persons whomsoever in connection with said project or projects; and it is further understood and expressly intended that the grant of permit herein and/or the approvals and supervision herein contemplated shall not operate as a consent of the State to be sued, or as a waiver of its constitutional immunities from suit, nor as a pledge of good faith of the State of Iowa or the Iowa State Highway Commission to the completion of said Hydro-Electric project.

IV. That the First Iowa Hydro Electric Cooperative by acceptance of this permit as herein set forth thereby agrees to hold the State of Iowa, the Iowa State Highway Commission, its agents and employees, safe and harmless from payment of any expense of litigation and/or any and all claims of whatsoever nature and kind arising out of any of the projects herein referred to.

V. That the First Iowa Hydro Electric Cooperative by acceptance of this permit as herein set forth further agrees that upon failure to conform to or perform any of the requirements and/or conditions herein specified the Iowa State Highway Commission may revoke this permit, and the same shall become null and void upon notice of

such revocation being mailed by registered mail to the President or Secretary of said Cooperative at its last known address or the home address of said Cooperative.

VI. That this permit is not transferable.

VII. That subject to the requirements and conditions herein set forth this permit shall become effective upon acceptance thereof by Resolution of the Board of Directors of said First Iowa Hydro Electric Cooperative and evidenced by the signature hereto of the President and attested by the Secretary.

VIII. That this permit shall be null and void if the First Iowa Hydro Electric Cooperative shall fail to construct and complete said Moscow Dam project as contemplated in Section 7792 of the Code or a revocation or forfeiture is accomplished as in said Section 7792 provided; it being further understood and agreed that a revocation or forfeiture of the Executive Council permit granted, as provided in Chapter 363 of the Code, likewise operates to revoke and forfeit this permit herein granted.

This Resolution adopted this 29th day of May 1940.

IOWA STATE HIGHWAY COMMISSION
By RANDALL WILSON, *Chairman*
R. B. LAIRD
GUS A. OLSON
A. H. HURST
L. M. EICHER
Commissioners.

Attest:
WAYNE J. FLUERT
Secretary

Accepted this first day of June, 1940.

FIRST IOWA HYDRO ELECTRIC COOPERATIVE.

By F. A. E. GILLMOR, *President.*

Attest:

H. J. STRONG
Secretary

EXHIBIT D–2

MUSCATINE COUNTY PERMIT

Resolution passed at special session held August 21, 1940

Moved by F. G. Wilford, Seconded by John Foley that the following Resolution be adopted, and after due consideration by the Board the Resolution was adopted by a unanimous vote for the Resolution.

RESOLUTION

Whereas, the First Iowa Hydro Electric Cooperative of Muscatine, Iowa, has through its Secretary, H. J. Strong, expressed its desire to construct a dam in Cedar River in Section Two (2), Three (3), Eleven (11), and Twelve (12) Township Seventy-seven (77) North, Range Three (3) West of the Fifth (5th) Principal Meridian in Muscatine County, Iowa, commonly called the "Moscow Dam", and has advised this Board of Supervisors that when said dam is closed the water level of the Cedar River will be raised to such extent that certain changes will be necessary in the public highways and approximately seventeen (17) bridges in the Cedar River Valley in

the area affected by the above described dam in the County of Muscatine, State of Iowa, and

Whereas, these public highways and bridges in the affected area of this proposed lake being under the jurisdiction of the County Board of Supervisors of Muscatine County, Iowa, and will be affected by the building of the proposed project, and

Whereas, the County Board of Supervisors, Muscatine County desires for itself, the County, and its people, full protection and consideration for all damages to bridges, highways, highway routes, and other public interests and property under its jurisdiction, and

Whereas, this is a permit, insofar as this Board of Supervisors has authority, to construct said dam and its appurtenances under the following conditions, to wit:

It is mutually stipulated by the Muscatine County Board of Supervisors and the First Iowa Hydro Electric Cooperative that the above permit for the alteration, and changes and abandonment of the said highways, bridges, and public property shall be mutually arranged for, agreed upon, and approved as to plans, procedure, and expense by the said Muscatine Board of Supervisors, by all authorities, and by the First Iowa Hydro Electric Cooperative before any construction work is commenced on any part of the project by the First Iowa Hydro Electric Cooperative.

E. R. SWICKARD
Secretary

GEO. L. SAUER
Chairman of Board

I, E. R. Swickard, do hereby certify that I am the duly elected and qualified County Auditor and Secretary to the Board of Supervisors of Muscatine County, Iowa.

I further certify that the above Resolution is a true and correct copy of the same as passed by the Board of Supervisors of Muscatine County, Iowa, on the 21st day of August, 1940.

Given under my hand and seal this 21st day of August, 1940.

[SEAL] E. R. SWICKARD
County Auditor in and for
Muscatine County, Iowa.

EXHIBIT D–3

CEDAR COUNTY PERMIT

Resolution

Whereas the First Iowa Hydro Electric Cooperative of Muscatine, Iowa, (a non-profit Cooperative Association incorporated under the laws of Iowa) has requested through and by its Secretary, Mr. H. J. Strong, a permit from the County Board of Supervisors of the County of Cedar, State of Iowa, and

Whereas, this Board of Supervisors is desirous of cooperating with the sponsors of the proposed Hydro Electric project in the Cedar River, and

Whereas, said Hydro Electric project will be partially located in this County of Cedar, State of Iowa, and

Whereas, said project may affect certain public roads, highways, bridges or other property coming under the jurisdiction of the County of Cedar, and

Therefore, we hereby Resolve to issue, grant and give to the said First Iowa Hydro Electric Cooperative our approval and intend this to be a permit in so far as the law provides such authority to this Board of Supervisors to change, alter, reconstruct, abandon any road, highway, bridge or other property coming under or within our jurisdiction as may be necessary or required in the building or operation of said Hydro Electric project, with the following expressed understanding, to-wit:

That no change, alteration, construction, reconstruction, abandonment or other commencement shall be had or begun until each item is agreed to in method, detail or condition as to such changes, alterations, construction, reconstruction or abandonment of said roads, highways, bridges, or property by this Board of Supervisors of Cedar County.

The purpose and intent of this action is to provide the First Iowa Hydro Electric Cooperative with our permission so it may proceed to do its preliminary work and at the same time secure for the County of Cedar the right to agree to what is done under such permit after the preliminary work is completed and before any actual construction is commenced.

It is specifically agreed that this permit shall be binding upon this Board only insofar as said Board is empowered to act by law, and that any change, alterations or re-establishment of highways shall be in accordance with the provisions of the statutes of the State of Iowa, and that no such alterations, changes or reconstruction shall be made or commenced until full and complete

settlement shall have been made by the applicant for permit for any and all damages incurred in such changes to Cedar County.

It was moved by Sup. Crees seconded by Sup. Thomson that the above Resolution be adopted.

Ayes: Thomson, Crees, Fraseur.

Absent: Crist.

Resolution adopted.

I, L. C. Hamiel, County Auditor of Cedar County, Tipton, Iowa, hereby certify that the above Resolution was adopted by the Board of Supervisors of Cedar County in adjourned regular session of July 28, 1941, as recorded in Minute Book 11.

Dated at Tipton, Iowa this 28th day of July, 1941.

[SEAL]

L. C. Hamiel,
L. C. HAMIEL,
Auditor.

EXHIBIT E

APPLICATION FOR LICENSE BY FIRST IOWA HYDRO ELECTRIC COOPERATIVE

Statement re water rights

Applicant owns no water rights at present.

After the grant of a license, applicant contemplates obtaining the necessary water rights through the purchase of land and through the application of his rights of eminent domain.

Applicant has agreements with the Federal Construction Company by which he will acquire practically all of the riparian rights to all of the land on the Cedar River from the site of the primary diversion dam and extending to the junction of

the Cedar and Iowa Rivers. The diversion of water from the Cedar River will, therefore, raise no legal obstacles as far as property holders are concerned.

It is the opinion of our Counsel that our present State Charter, combined with the license from the Federal Power Commission, will enable us to obtain all the necessary water rights.

Applicant is advised by Counsel that there is no provision in the State Law by which he may obtain the use of water for diversion from the Cedar River to the Mississippi and that no valid state law exists which is applicable to his project.

Applicant has complied with all state requirements such as those referring to Public Highways, Public Property and Public Health.

VERIFICATION

The above statement has been read by me and is a true and correct statement of the facts to the best of my knowledge and belief.

H. J. STRONG,
Secretary,
First Iowa Hydro Electric Cooperative.

Date, August 8th 1941.

U. S. GOVERNMENT PRINTING OFFICE: 1942

FILE COPY

Office - Supreme Court, U. S.
FILED
DEC 4 1945
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 603.

FIRST IOWA HYDRO-ELECTRIC CO-OPERATIVE,
Petitioner,

vs.

FEDERAL POWER COMMISSION,
Respondent,

STATE OF IOWA,
Intervenor.

INTERVENOR'S RESISTANCE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

JOHN M. RANKIN, Attorney General of Iowa,
State House,
Des Moines, Iowa,
NEILL GARRETT, Special Assistant Attorney General of Iowa,
1204 Equitable Building,
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Washington, D. C.,
Attorneys for State of Iowa, Intervenor.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

No. 603.

FIRST IOWA HYDRO-ELECTRIC CO-OPERATIVE,
Petitioner,

vs.

FEDERAL POWER COMMISSION,
Respondent,

STATE OF IOWA,
Intervenor.

INTERVENOR'S RESISTANCE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

The State of Iowa, the Intervenor herein, respectfully prays and requests the Court to deny and to dismiss the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia entered on August 13, 1915, which affirmed the order of the Federal Power Commission denying the application of the petitioner for a permit to construct a hydro-electric project in and upon the Cedar River in the State of Iowa.

The State of Iowa as a sovereign state, through its Attorney General, intervened in these proceedings before the Federal Power Commission and in the United States Court of Appeals for the District of Columbia. It was necessary for the State of Iowa to protect itself and its statutes in this proceeding because the attorneys for the Federal Power Commission, Respondent, took the position and argued in the lower Court that the Iowa statutes made applicable by reference in Section 9(b) of the Federal Power Act, are invalid although that question had never before been raised or decided in any State or Federal Court.

The opinion of the United States Court of Appeals for the District of Columbia is reported in 151 F. (2d) 20. It is set out also in the Record commencing with page 54. The Order of the Federal Power Commission dismissing Petitioner's application for a license is set out at page 18 of the Record and the supporting opinion of the Power Commission is set out commencing on page 14 of the Record.

JURISDICTION.

The petitioner invokes the jurisdiction of this Court under the provisions of Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, and under Section 313(b) of the Federal Power Act.

FEDERAL STATUTES INVOLVED.

The principal statute involved is Section 9(b) of the Federal Power Act. The Federal Power Act is the Act of June 10, 1920, (C. 285, 41 Stat. 1063, amended August 26, 1935; C. 687, 49 Stat. 838, 16 U.S.C. Sec. 791(a)).

—3—

QUESTIONS INVOLVED.

The Petitioner has set out on pages 2 to 5 of the Petition, the questions which it is presenting to this Court. These may be grouped for convenience as follows:

(1) Whether compliance with Section 9(b) of the Federal Power Act is required as a prerequisite to the granting of a license by the Federal Power Commission;

(2) Whether there are applicable laws of the State of Iowa "with respect to bed and banks and to the appropriation, diversion and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting and distributing power" or any other business necessary to effect the purposes of a license under the Federal Power Act;

(3) Whether the United States Court of Appeals erred in finding that there are applicable laws of the State of Iowa, the compliance with the requirements of which is a prerequisite under the provisions of Section 9(b) of the Federal Power Act to the granting of a license to the Petitioner;

(4) Whether the Federal Government has preempted the entire field in the enactment of the Federal Power Act to the exclusion of provisions of the State law as contained in Chapter 363 of the Code of Iowa.

STATEMENT.

The First Iowa Hydro-Electric Cooperative, the Petitioner herein, is a private Corporation for profit organized under the provisions of Chapter 390.1 of the Code of Iowa, 1939.

The Petitioner is seeking a review of the findings and judgment of the United States Court of Appeals for the District of Columbia, wherein that Court affirms the order

of the Federal Power Act which denied the application of the Petitioner for a permit to build a dam and hydro-electric power project on the Cedar River within the State of Iowa.

The State of Iowa, the Intervenor herein, respectfully submits to the Court that the Petitioner is not entitled to a writ of certiorari herein under the record and the status of this entire matter. The Intervenor respectfully submits to this Court that the petition should be denied and dismissed for all of the reasons hereinafter stated.

The Petitioner applied to the Federal Power Commission for a permit to build and construct a hydro-electric project and a dam in the Cedar River in such a manner as to virtually divert the river from its river-bed through a canal, which canal would empty into the Mississippi River and in which canal the power unit would be constructed. By this diversion of the water of the Cedar River, twenty-nine miles of the Cedar River from the point of the dam to its juncture with the Iowa River would become practically a dry run.

The only purpose is to construct a power project to sell current commercially. It is undisputed that by the nature of the construction there could be no navigation whatsoever from the Cedar River above the dam through this diversion canal, and obviously there could be no navigation in the dry-bed of the Cedar River in the twenty-nine mile stretch below the dam. The evidence shows beyond dispute that the Cedar River has been utilized by cities and towns located along its course, as a means of carrying away the sewerage from these various cities and towns and that the dam and the diversion canal will greatly interfere therewith and will undoubtedly create a health hazard and nuisance. The record shows without dispute that no provision has been made in the plan to preserve the fish in the river or to create an adequate fish way so that fish may proceed from the Mississippi River

up into the Cedar River. The project would destroy the recreational and fishing facilities afforded to the public in the Cedar River as now constituted.

Further, it is undenied and it is affirmatively shown in the record that the proposed project will overflow portions of paved primary highways of the State of Iowa, namely United States Highways No. 6, No. 38 and No. 61, and Iowa Primary Highway No. 22, such as to require rerouting and new construction, at great cost. The foregoing statement is sufficient to inform the Court as to the public interest of the State of Iowa in the proposed project.

Section 9(b) of the Federal Power Act (16 U.S.C.A. 802(b)) is the statute which is primarily involved in this proceeding. It provides among other things as follows:

> "Each applicant for a license under this Chapter shall submit to the Commission—
>
> (b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting and distributing power, and in any other business necessary to effect the purposes of a license under this Chapter."

The Petitioner ignored the provisions of said Section 9(b) and admitted both before the Power Commission and the United States Court of Appeals that the Petitioner had not complied with the requirements of the laws of the State of Iowa "with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting and distributing power". The Petitioner takes the position that although the State of Iowa has provisions of law applicable to the development and

regulation of water power in its streams as contained in Chapter 363 of the Code of Iowa, 1939, that said provisions of the Iowa law are invalid in that the Federal Government by the enactment of the Federal Power Act has completely and fully taken over the entire field. This in substance is the main question raised by petitioner.

The United States Court of Appeals for the District of Columbia filed a very carefully written opinion in connection with its judgment affirming the Order of the Federal Power Commission dismissing Petitioner's application. This opinion very carefully and fully reviews every legal aspect of the case, reviews the prior decisions of this Court and other Courts upon the questions involved, cites the authorities, and draws correct conclusions therefrom. It would be presumptuous for the writer of this Resistance to attempt to improve upon the review of applicable legal propositions and citations of authority therein contained in the opinion of the Court of Appeals. The ground is most thoroughly and painstakingly covered, and we submit that the inevitable conclusions expressed therein cannot be successfully refuted or challenged.

However, we shall direct attention to a specific reply to the affirmative statements contained in the petition for a writ.

REPLY TO PETITIONER'S REASONS FOR GRANTING A WRIT.

Petitioner states that this case is one of vital public significance. The case as it now stands with the decision against Petitioner is not one of vital public significance. However, on the other hand, if the Court should hold that Section 9(b) of the Federal Power Act does not mean what it says and does not require the applicant to submit satisfactory evidence to the Commission that it has complied

with the applicable laws of the State of Iowa, then that decision would be of vital public significance. The Petitioner comes to this Court admitting plainly that it has not even applied to any agency of the State of Iowa as required by the laws of the State of Iowa, for a permit to build or construct the project and dam. The Petitioner ignores the general rule that administrative remedies must be exhausted before judicial review can be availed of. The Petitioner went to the Power Commission and when confronted with Section 9(b) of the Power Act, said to the Commission that the provisions of Chapter 363 of the Iowa Code relative to such matters are invalid and inapplicable, and asked the Commission to so find. The Commission rightly responded that it had no right to determine the validity of the State statutes and had no other alternative than to refuse a permit because of the failure of the Petitioner to comply with Section 9(b) of the Act. See *Davies Warehouse Co.* v. *Bowles*, 321 U.S. 144; 88 L. ed. 379.

The Petitioner then on appeal to the United States Court of Appeals took the same position and argued that the Iowa statutes are inapplicable and void and that the Petitioner had a right to so assume, and asked the Court to so hold. Because of this situation and of this position taken by the Petitioner, the Intervenor submits that the Petitioner has disqualified itself from applying for or being entitled to a writ of certiorari in this case. It will be kept in mind that the Petitioner ignores the fact that it is a private party seeking to secure a permit from the Federal Government to obstruct a navigable river under a code of Federal laws primarily designed to protect navigation under the commerce clause of the Constitution. The Petitioner presumes to assume that it is entitled to the same rights as the sovereign Government of the United States were that sovereign seeking to build the dam and the obstruction in the Cedar River for governmental purposes. Obviously the Federal Power Act and other

kindred laws of the United States are definitive in nature and restrict the things that an applicant or permittee may or may not do which would tend to obstruct or to interfere with navigation.

Therefore, the Intervenor submits that under the record here, the Petitioner is not entitled to, nor is it eligible to apply for a writ of certiorari, and that the petition therefor should be denied and dismissed.

I.

The Petitioner has set out in the Appendix to its Brief, Chapter 363 of the Code of Iowa, 1939, beginning on page 26 of the Brief. We invite the Court's examination thereof, and call attention to the following specific provisions:

"7767. Prohibition—permit. No dam shall be constructed, maintained, or operated in this state in any navigable or meandered stream for any purpose, or in any other stream for manufacturing or power purposes, nor shall any water be taken from such streams for industrial purposes, unless a permit has been granted by the executive council to the person, firm, corporation or municipality constructing, maintaining, or operating the same. (R60, Sec. 1264; C73, Sec. 1188; C97, Sec. 1921; C24, 27, 31, 35, Sec. 7767.)

7771. When Permit Granted. If it shall appear to the council that the construction, operation, or maintenance of the dam will not materially obstruct existing navigation, or materially affect other public rights, will not endanger life or public health, and any water taken from the stream in connection with the project is returned thereto at the nearest practicable place without being materially diminished in quantity or polluted or rendered deleterious to fish life, it shall grant the permit, upon such terms and conditions as it may prescribe. (R60, Sec. 1269; C73, Secs. 1193, 1198; C97, Sec. 1930; C24, 27, 31, 35, Sec. 7771.)

7796. State Lands. Whenever the erection of any such dam will affect highways or state-owned lands, the

applicant shall as a condition precedent secure a permit from the board, commission, or other official body charged with jurisdiction over and control of said highways or state-owned lands. (C'24, 27, 31, 35, Sec. 7796.)"

Section 7768 states the form and contents of the application for a State permit. Section 7769 provides for notice of hearing, and Section 7760 provides for a hearing before the Executive Council of the State of Iowa. It will be observed that Section 7767 quoted above provides that no dam shall be constructed in any navigable or meandered stream for any purpose, and that no water shall be taken from streams for industrial purposes "*unless a permit has been granted by the Executive Council*" therefor.

It will be noted further that Section 7771 quoted above provides that if it shall appear to the Executive Council that the construction, operation or maintenance of the dam will not materially obstruct existing navigation, or materially affect other public rights, will not endanger life or public health, and any water taken from the stream in connection with the project is returned thereto at the nearest practicable place without being materially diminished in quantity or polluted, or rendered deleterious to fish life, it shall grant a permit.

Obviously the State of Iowa does have laws such as are referred to in Section 9(b) of the Federal Power Act, and that under the provisions of said Section 9(b) the applicant herein for a license is required to submit to the Commission satisfactory evidence that the applicant has complied with the requirements of the laws of the State of Iowa with respect to bed and banks and to the appropriation, diversion and use of water. It was clearly the intention of Congress in the enactment of this provision that no private person should have the right to interfere with the enjoyment by the State of any of the waters of the State, without first complying with the laws of the State relative thereto.

If Petitioner's contention be correct, the Petitioner could by prevailing upon the Federal Power Commission to grant to it a permit, destroy valuable State property by flooding it and the State would be helpless. The record in this case shows that primary highways of the State will be flooded by this very proposal and those highways will have to be rerouted and rebuilt at considerable expense to the State of Iowa. We submit that it is obvious that Congress did not intend to permit any such violation of the rights of a sovereign State, and that by putting into the Federal Power Act the provisions of Section 9(b), Congress intended to require as a prerequisite to the granting of a permit by the Commission that the applicant must present satisfactory evidence of its compliance with the requirements of the applicable laws of the State.

Petitioner on page 9 of its petition, argues in this Court for the first time, that Section 23(b) of the Federal Power Act delineates the spheres within which State and Federal authorities may rightfully operate in the regulation of proposed power projects on flowing streams within the borders of a State. Section 23(b) (Sec. 817, 16 U.S.C.) refers to the obstructing of non-navigable streams which may or may not affect navigation in a navigable stream. There are many situations in the cases where an obstruction in a non-navigable stream has been held to affect navigability in a navigable stream. Under such circumstances this Section requires an applicant to secure a permit from the Federal Power Commission. However, the Section also provides that if the Commission finds that navigation is not affected and that no public lands or reservations are affected, the Commission shall grant permission to build the project upon compliance with State laws. This section merely carries out the general purpose of the Act that navigation must be protected, and that the Federal Government will not authorize a project

to be built by private individuals, unless the State consents thereto. There is nothing in Section 23(b) which affords any support to Petitioner's argument.

II.

The Petitioner states commencing on page 10 of its brief, that Chapter 363 of the Code of Iowa is a comprehensive enactment of general application concerning the development and regulation of water power and that the Chapter must be construed as a whole. It is true that the laws of Iowa relative to obstructions in streams, relative to mill races and to dams and to water power improvements, are all contained in Chapter 363 of the Code of Iowa. There are several different subjects covered in the Chapter. The provisions with which we are directly concerned in this proceeding are in Sections 7767, 7771 and 7796. Much of the rest of the Chapter is adjective law and is procedural. The Court of Appeals in its opinion refers to Chapter 363 of the Code of Iowa as such, time and time again, and at times points out individual sections and particularly Sections 7771, 7772 and 7796 for specific comment. By so doing the Court of Appeals has not ignored the other applicable provisions of the Chapter.

As stated, the Petitioner has not applied for a permit to build this project to the Executive Council of the State of Iowa nor to the Highway Commission of Iowa which has charge of highways, nor to the Board of Conservation which has charge of recreational and park facilities. The Petitioner has ignored the State. The Petitioner does not know and cannot know what view the Executive Council of the State might take of the proposed project until Petitioner has at least afforded the Executive Council an opportunity to pass upon an application for a permit. Neither does the Petitioner know whether the State Highway Commission would grant

a permit to Petitioner to build the project until it has afforded the Highway Commission an opportunity to pass upon an application. The same thing is true of the State Board of Conservation which under Section 7796 of the Code of Iowa, has jurisdiction over parks, river-beds, fishing and recreation. The State authorities may or may not grant the permit. The Petitioner is not entitled to raise these questions in the United States Court of Appeals nor in this, the Supreme Court, on this record. See *Highland Farms Dairy, Inc.*, v. *Agnew*, 300 U.S. 608, 616-617; *Red River Broadcasting Co.* v. *Fed. Communications Comm.*, 69 App. D. C. 1, 3, 98 F. (2d) 282, 284.

Counsel for Petitioner directly challenge the constitutionality of the Iowa statutes in the Court of Appeals and in this Court, and we submit that under the circumstances, Petitioner is not entitled to make such an attack. In the recent case of *Spector Motor Service, Inc., Petitioner* v. *McLaughlin, Tax Commissioner, Defendant*, decided by this Court December 4, 1944, and reported in 89 Law Edition at page 105, this Court discussed the question of constitutional adjudication and when the question could be raised in the Federal Courts. At page 108 the following appears:

> "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality—here the distribution of the taxing power as between the State and the Nation—unless such adjudication is unavoidable. And so, as questions of federal constitutional power have become more and more intertwined with preliminary doubts about local law, we have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law."

So questions of constitutionality of the laws of Iowa will not be determined by the Federal Courts until definite determinations have been made by the State Courts.

The Petitioner challenges the validity and the constitutionality of the Iowa statutes by asserting that it was the intention of Congress by the enactment of the Federal Power Act, to take over the entire field insofar as control over obstructions in navigable waters are concerned. We submit that the language of the Act does not bear such construction.

The Petitioner contends that there is a conflict between the provisions of the Federal Power Act and the statutes of the State of Iowa referred to and that the State statutes must give way to the superior power of the Federal Government. At the outset we submit as the Court of Appeals has found, that there is no conflict between the Federal and the State statutes.

We submit that the Federal Power Act anticipates a dual system of control. Congress by Section 9(b) of the Federal Power Act expressed the major intention that the States and the National Government should participate jointly in the development and regulation of water power projects. The maintenance of running streams, the preservation of wild life, the rights of riparian owners, drainage, sewerage, and industrial waste disposal and many other questions of public health and public policy are involved. It is the established policy of this Court that an overriding Federal power will not be exercised except when Congress manifests a clear intent so to do. The rule being followed by this Court was stated recently in *Connecticut Light & Power Company, Petitioner*, v. *Federal Power Commission*, decided March 26, 1945, and reported in 89 L. ed. 691 at 700. This Court there said:

> "We have said, and it is applicable to this case, that 'Where a Federal agency is authorized to invoke an overriding Federal power except in certain prescribed situations and then to leave the problem to traditional state control, the existence of Federal authority to act should appear affirmatively and not rest on inference

> alone'. *Yonkers* v. *United States*, 320 U.S. 685, 692, 88 L. ed. 400, 404, 64 S. Ct. 327; *Florida* v. *United States*, 282 U.S. 194, 211, 212, 75 L. ed. 291, 301, 302, 51 S. Ct. 119; cf. *Palmer* v. *Massachusetts*, 308 U.S. 79, 84, 84 L. ed. 93, 97, 60 S. Ct. 34, 41 Am. Bankr. Rep. (N.S.) 131; *Federal Trade Commission* v. *Bunte Bros.*, 312 U.S. 349, 351, 85 L. ed. 881, 883, 61 S. Ct. 580. Nothing except explicit findings excluding the grounds of state control gives assurance that the bounds of Federal jurisdiction have been accurately understood and fully respected, and that state power has been considerately and deliberately overlapped."

It is therefore submitted that it is impossible to find any language in the Federal Power Act which indicates an intent on the part of Congress to override the rights of the State in such matters but on the contrary Congress by the inclusion of Section 9(b) of the Act clearly recognized State rights in these matters.

As stated by the Court of Appeals in its opinion, the rule of statutory construction applicable is that congressional intention to displace local laws in the exercise of the commerce power is not to be infegred, but must be clearly indicated.

This Court in *U.S.* v. *West Virginia*, 295 U.S. 463 at 472, 79 L. ed. 1546-1552, interpreted the provisions of Section 9(b) of the Federal Power Act. Mr. Justice Stone, speaking in that case, said:

> "The bill seeks an injunction against the corporate defendants, restraining only the construction of the dam without a license from the Federal Power Commission. But Section 9(b) of the Federal Water Power Act requires that every applicant for a license shall present 'satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of

> developing, transmitting, and distributing power * * *. The mere grant of the state license, which the Federal Water Power Act makes prerequisite to the application for the Federal license, cannot be said to involve any infringement of the federal authority. It does not appear that the State has done more."

Historically there has always been a sharing of responsibility and power over waters within the borders of a State. In *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 434; 85 L. ed. 243; 267, the authority of the States is recognized. It is there said:

> "The states possess control of the waters within their borders, 'subject to the acknowledged jurisdiction of the United States under the Constitution in regard to commerce and the navigation of the waters of rivers'. It is this subordinate local control that, even as to navigable rivers, creates between the respective governments a contrariety of interests relating to the regulation and protection of waters through licenses, the operation of structures and the acquisition of projects at the end of the license term. But there is no doubt that the United States possesses the power to control the erection of structures in navigable waters."

Again, in *Illinois Central Railroad* v. *State Public Utility Commission*, 245 U.S. 493 at 510, 62 L. ed. 425, 438, this Court said the following:

> "In construing federal statutes enacted under the power conferred by the commerce clause of the Constitution * * * it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a State, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested."

Again in the case of *Maurer* v. *Hamilton*, 309 U.S. 589, 611; 84 L. ed. 969, 980, this Court stated a rule of statutory construction which is applicable in the case at bar as follows:

"As a matter of statutory construction congressional intention to displace local laws in the exercise of the commerce power is not, in general, to be inferred unless clearly indicated by those considerations which are persuasive of the statutory purpose. This is especially the case when public safety and health are concerned."

Attention is also called to *Kelly* v. *State of Washington*, 302 U.S. 1, 9; 82 L. ed. 3, 10, where it is specifically stated that the principle is thoroughly established that the exercise by a State of its police power which would be valid if not superseded by Federal action, is superseded only where the repugnance or conflict is so direct and positive that the two Acts cannot be reconciled or cannot consistently stand together.

In practically every case where there has been a conflict between the power of the State and the power of the Federal Government, under the commerce clause, the Federal Government has interceded only to prevent an obstruction or interference with the navigation on a stream or an interference with commerce between the States by the creation of obstructions in or diversions of navigable waters. The exercise of the power of the Federal Government in such instances has been against interferences with navigation or the free flow of commerce, and not an affirmative assertion of the right on the part of the Federal Government to authorize such obstructions.

Congress, in the Rivers and Harbors Act of 1899 relating to navigation and navigable waters, long before the enactment of the Federal Power Act, took the same precautions and recognized the rights of the States in the same manner, as it did in the Federal Power Act and in Section 9(b) of the Act here in question.

For example, note the provisions of Section 9 of the Act of March 3, 1899 (30 Stat. 1151) U.S. Title 33, Section 401. It is there provided in so far as applicable:

"It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War: Provided, That such structures may be built under authority of the Legislature of a State across rivers and other waterways, the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced. * * *".

In the *Appalachian Electric Power* case, *supra*; after describing the inherent power of the Federal Government over the water power and flowing streams, this Court said (311 U.S. 377, 434; 85 L. ed. 243, 267):

"Possessing this plenary power to exclude structures from navigable waters and dominion over flowage and its product, energy, the United States may make the erection or maintenance of a structure in a navigable water dependent upon a license. This power is exercised through Section 9 of the Rivers and Harbors Act of 1899, 33 U.S.C.A. Section 401, prohibiting construction without congressional consent and through Section 4(e) of the present Power Act, 16 U.S.C.A. Section 797(e)."

On page 11 of its brief, the Petitioner states that joint State and Federal control means divided authority and that it is unreasonable to assume that Congress intended by Section 9(b) of the Act to require compliance with State laws by securing a State permit. Petitioner contends that if a State permit cannot be obtained then the Federal Power Act is thwarted and in effect vetoed by the State. That statement is an inaccuracy. The Federal Power Act is not vetoed. The application of a private party applying for a right to

obstruct a stream located within a State might be denied. The statement of Petitioner that a State might veto the Federal authority would be applicable only where a State attempts to construct an obstruction in a navigable water when the Federal Power Commission had refused to grant a permit under the Federal Power Act. That is not the case here. The law says that the Federal Power Commission may grant the permit if there is no objection thereto but that the applicant cannot have a permit until he has satisfied the Commission that he has also complied with State laws which may be applicable. There are many instances where there are dual controls. Attention is called to the recent case of *United States* v. *Southeastern Underwriters Assn.*, 322 U.S. 533, 548; 88 L. ed. 1440, 1451, where this Court stated the following:

> "It is settled that, for Constitutional purposes, certain activities of a business may be intrastate and therefore subject to state control while other activities of the same business may be interstate and therefore subject to federal regulation. And there is a wide range of business and other activities which, though subject to federal regulation, are so intimately related to local welfare that, in the absence of Congressional action, they may be regulated or taxed by the states. In marking out these activities the primary test applied by the Court is not the mechanical one of whether the particular activity affected by the state regulation is part of interstate commerce, but rather whether, in each case, the competing demands of the state and national interests involved can be accommodated."

So it is submitted that simply because an applicant for a permit is required to satisfy both the State and Federal authority, that does not mean that a State can veto the Federal Power Act. As heretofore stated, the Federal Power Act is restrictive in nature and designed primarily to protect navigation and Interstate Commerce. It is not a statute designed for the purpose of letting the bars down and per-

mitting the erection and construction of any and all sorts of obstructions in navigable waters. Obviously a permit issued under the State law could not authorize and permit something which the permit issued by the Federal Power Commission under the Federal Power Act prohibits. Therefore there is no repugnancy.

III.

Counsel for the Petitioner argues as though a permitholder under the Federal Power Act authorized to construct a private project assumes the prerogatives of the Federal Government under the commerce clause. That cannot be true. Such a permittee secures only a right to build the project if the permit is granted in accordance with the restrictions and requirements prescribed by the law and the Commission. A permittee is not clothed with governmental authority simply because the Power Commission may give it a license to build its project. The Ninth Circuit Court in *United States* v. *Central Stockholders Corporation of Vallejo, et al.*, 52 Federal (2d) 322 at 332 stated:

> "The Supreme Court held in the *Ford* case, (*Ford & Son* v. *Little Falls Co.*, 280 U.S. 369, 50 S. Ct. 140, 74 L. ed. 483) in effect, that it was not the intention of Congress to vest any portion of its sovereign power in the permittee, and, assuming that the government might have exercised its control over navigable streams by and through a permittee under the Federal Water Power Act, that it was not the intention of the Government so to do."

The present case involves no more than the expressly limited powers of a Federal Agency to license a private corporation which seeks to operate under the restrictive provisions of the Power Act. Congress clearly intended that the Federal Power Commission should cooperate with the States.

Section 9(b) of the Federal Power Act expresses the major intention of Congress that the States and the National

Government shall participate jointly in the development and regulation of water power projects. As stated by the Court of Appeals in its opinion, this section preserves State laws "with respect to bed and banks (of streams) and with respect to the appropriation, diversion and use of water for power purposes".

Obviously this Section operates the same as does Section 27 of the Act preserving to the States the control, appropriation, or use or distribution of water used in irrigation or for municipal purposes. Petitioner is by innuendo attempting to read interpretations into the judgment and findings of the Power Commission and of the Court of Appeals which are not justified or borne out by the language of the law.

Petitioner is not impaled on the horns of a dilemma as it contends. All Petitioner is required to do is to satisfy the most rigid regulations of either the Federal Power Commission or the State, whichever may be the most strict. Petitioner assumes and states in argument that it is of the opinion that it could not secure a permit from the Executive Council of the State of Iowa. Such a statement has no place in this matter. Petitioner has ignored the State of Iowa and has not tried to secure a permit. It is not in good standing and is not entitled to assert the fact until it becomes the fact. The Executive Council may decide Petitioner's project is so beneficial to the State as to overbalance any of the objectionable features. That is the province of the Executive Council of the State of Iowa.

It is submitted that the presentations by the Petitioner on these matters are unsound and unworthy of consideration.

CONCLUSION.

The only real proposition before this Court is whether the Petitioner complied with the provisions of Section 9(b)

Federal Power Act, by furnishing satisfactory evidence that the applicant has complied with the requirements of the laws of the State of Iowa with respect to bed and banks and to the appropriation, diversion and use of water for power purposes. Petitioner is not attacking the constitutionality or validity of Section 9(b) of the Water Power Act. Petitioner, by indirection and innuendo is saying to this Court that Section 9(b) of the Water Power Act does not mean what its plain language states. The State of Iowa submits that this may be termed a back door attack upon the applicable laws of the State of Iowa and, therefore, cannot prevail.

It is submitted that Petitioner is not entitled to a review, nor to attack in this Court the statutes of Iowa because Petitioner admittedly has never made any effort to comply with either Section 9(b) of the Federal Power Act or with the applicable statutes of Iowa, and has never given the Executive Council of Iowa nor any other state agency an opportunity to pass upon the proposed project.

It is submitted that there is no repugnancy between the Federal Power Act and the Iowa statutes because Congress by reference in Section 9(b) of the Federal Power Act made the statutes of the State a part of the Federal Power Act and they cannot, therefore, be found to be invalid or to be repugnant to the Federal Power Act.

The State of Iowa, the Intervenor herein, respectfully submits to the Court that the Petitioner is not entitled to sue for a writ of certiorari in this Court, and that in any event the Petition herein should be denied and dismissed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 603.

FIRST IOWA HYDRO-ELECTRIC CO-OPERATIVE,
Petitioner,

vs.

FEDERAL POWER COMMISSION,
Respondent,
STATE OF IOWA,
Intervenor.

BRIEF FOR STATE OF IOWA, INTERVENOR.

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FIRST IOWA HYDRO-ELECTRIC CO-OPERATIVE,
Petitioner,

vs.

FEDERAL POWER COMMISSION,
Respondent.

STATE OF IOWA,
Intervenor.

BRIEF FOR STATE OF IOWA, INTERVENOR.

This matter is before the Supreme Court of the United States upon a Writ of Certiorari to the United States Court of Appeals for the District of Columbia on the opinion and decision by that Court reported in 151 F. (2d) 20 in the above entitled action. The Court of Appeals affirmed the order of the Federal Power Commission which denied the application for a permit by the petitioner herein to construct a project in the Cedar River located in the State of Iowa.

JURISDICTION.

The petitioner invokes the jurisdiction of this Court under the provisions of Section 240(a) of the Judicial Code

as amended by the Act of February 13, 1925 (28 U.S.C.A. Sec. 347) and Section 313(b) of the Federal Power Act (39 Stat. 860, 16 U.S.C.A. Sec. 825(b)).

FEDERAL STATUTES INVOLVED.

The principal statute involved is Section 9(b) of the Federal Power Act. The Federal Power Act is the Act of June 10, 1920 (C. 285, 41 Stat. 1063 as amended, August 26, 1935; C. 687, 49 Stat. 838, 16 U.S.C. Sec. 791(a).

QUESTIONS INVOLVED.

The petitioner has set out on pages 2 to 5 of its brief twelve questions which petitioner states it is presenting to this Court. The State of Iowa, the intervenor herein, submits that the questions before this Court are as follows:

1. Whether compliance with Section 9(b) of the Federal Power Act (16 U.S.C.A. Sec. 802(b)) is required as a prerequisite to the granting of a license by the Federal Power Commission;

2. Whether there are applicable laws of the State of Iowa "with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting and distributing power"; and in any other business necessary to effect the purposes of a license under the Federal Power Act;

3. Whether the United States Court of Appeals erred in finding that there are applicable laws of the State of Iowa, the compliance with the requirements of which is a prerequisite under the provisions of Section 9(b) of the Federal Power Act to the granting of a license to the petitioner;

4. Whether Congress has preempted the entire field by the enactment of the Federal Power Act to the exclusion of the provisions of the laws of the State of Iowa as contained in Chapter 363 of the Code of Iowa.

STATEMENT.

The petitioner herein is a private corporation organized under the provisions of Chapter 390.1 of the Code of Iowa, 1939. The petitioner challenges the opinion and judgment of the United States Court of Appeals for the District of Columbia in which that Court affirmed the order of the Federal Power Commission which denied the application of the petitioner for a permit to build a dam and hydro-electric power project on the Cedar River within the State of Iowa.

The State of Iowa in its sovereign capacity, intervened in the proceedings before the Federal Power Commission and in the United States Court of Appeals for the District of Columbia, and is now opposing and resisting the petition in these certiorari proceedings for the reason that petitioner failed to comply with the provisions of Section 9(b) of the Federal Power Act.

The petitioner applied to the Federal Power Commission for a permit to build and construct a hydro-electric project and dam in the Cedar River located wholly within the State of Iowa in such a manner as to completely divert the River from its riverbed through a canal, which canal would empty into the Mississippi River and in which canal the power unit would be constructed. By this diversion of the water in the Cedar River, twenty-nine miles of the river from the point of the proposed dam to its juncture with the Iowa River would become a dry run.

The Cedar River flows into and joins the Iowa River about 29 miles below the site of the proposed project, and the Iowa River flows into and joins the Mississippi River.

The petitioner's only purpose is to construct a power project to sell electric current commercially. It is admitted, and the nature of the proposed project discloses, that there could be no navigation whatsoever of even the smallest craft through, around or over this dam, or through the diversion canal. The result would be an absolute destruction of navigation or commerce from above the dam to the Mississippi River or from the Mississippi River into the Cedar River at any point. The undisputed evidence shows without dispute that the Cedar River has been utilized by the cities and towns located along its course as a means of carrying the sewerage from these various cities and towns, and that the dam and the diversion canal will greatly interfere therewith and will undoubtedly create a health hazard and nuisance. The cities of Cedar Rapids, Waterloo and Vinton, and many towns are located upon the Cedar River above the proposed project and their sewerage systems empty into the Cedar River and the sewage is carried away by the river and into the Iowa River and into the Mississippi River. The project would destroy the recreational and fishing facilities afforded to the public in the Cedar River as now constituted.

Further, it is affirmatively shown in the record and it is not denied by petitioners, that the proposed project will overflow and inundate portions of paved primary highways of the State of Iowa, namely, United States Highways Nos. 6, 38 and 61 and Iowa Primary Highway No. 22 to such an extent that it will be necessary to reroute said highways and to construct new grades and paving, all at great cost, expense and inconvenience to the State of Iowa and to the public. The foregoing statement is sufficient to inform the Court as to the public interest of the State of Iowa in the proposed project.

The sovereign State of Iowa, through its Executive Council, which is composed of the Governor, Secretary of State, Auditor of State, Treasurer of State and Secretary of

Agriculture, and its Attorney General, because of the public interest of the State in the results of the proposed project if constructed, resisted the application of the petitioner for a permit before the Federal Power Commission and resisted the appeal in the United States Court of Appeals for the District of Columbia, and is now resisting and objecting to the petitioner's petition in these proceedings, for all of the reasons hereinafter stated.

Section 9(b) of the Federal Power Act (16 U.S.C.A. 802(b)) is the statute which is primarily involved in these proceedings. It provides among other things as follows:

> "Each applicant for a license under this Chapter shall submit to the Commission—
>
> (b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting and distributing power, and in any other business necessary to effect the purposes of a license under this Chapter." Act of June 10, 1920, c.285 Sec. 9, (41 Stat. 1068); U.S.C. Title 16, Sec. 802.

The State of Iowa has laws "with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting and distributing power" in the navigable and non-navigable rivers located within the State. Those provisions of law are in Chapter 363 of the Code of Iowa, 1939, and will be specifically referred to in the argument.

The petitioner ignored the provisions of said Section 9(b) and admitted both before the Power Commission and the United States Court of Appeals, that the petitioner had not complied with the requirements of any of the laws of the

State of Iowa "with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting and distributing power". The petitioner takes the position that although the State of Iowa has provisions of law applicable to the development and regulation of water power in its streams and to the building of obstructions in the rivers located within the State, said provisions of the Iowa law are inapplicable and invalid in that the Federal Government by the enactment of the Federal Power Act, has completely and fully taken over the entire field. This in substance is the position of the petitioner as to the law.

SUMMARY OF ARGUMENT.

I.

Section 9(b) of the Federal Power Act requires as a prerequisite to the granting of a license by the Federal Power Commission under the provisions of the Federal Power Act, that an applicant must submit satisfactory evidence of compliance with the applicable laws of the State in which the project is located with respect to bed and banks and to the appropriation, diversion and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting and distributing power. The State of Iowa has applicable laws contained in Chapter 363 of the Code of Iowa, 1939, which requires that before any dam or project can be built in any of the navigable or meandered streams located in the State of Iowa, a permit must be secured from the Executive Council of Iowa after presentation of evidence, and a hearing is had.

Petitioner contends that the laws of the State of Iowa are inapplicable to its project because petitioner asserts that

the Federal Power Act took over and preempted the whole field and that it is not required to secure a permit from the Executive Council of the State of Iowa, and that if so the Iowa statutes are invalid and unconstitutional.

The proposed project will not only cut off approximately twenty-nine miles of the Cedar River and divert the water through a diversion canal to the Mississippi River but the water impounded above the dam will flood paved primary United States and State highways such as to require re-routing and new construction. The Cedar River is used to carry away sewerage from many cities and towns located along its course and above the site of the proposed project, including the City of Waterloo, having a population of 51,000, Cedar Rapids with a population of 62,000, and Vinton with a population of 4,000, all of which use the River for the purpose of disposing of their sewerage.

The State Executive Council under the provisions of Chapter 363 is required to protect the public, the interests of the State, and the rights of users of the River and when permits are granted to make such reasonable requirements and regulations as will effect those results.

The United States Court of Appeals for the District of Columbia affirmed the order of the Federal Power Commission denying the application of petitioner because it had not presented satisfactory evidence of compliance with the applicable laws of Iowa as required by Section 9(b) of the Federal Power Act. The United States Court of Appeals did not abuse its discretion in arriving at this decision. The Federal Power Act does not supersede State laws such as are involved in Chapter 363 of the Code. On the contrary the Power Act very carefully by specific provisions preserves and saves State statutes, and the Act indicates clearly an intention of Congress to cooperate with the States in the authorization of structures and obstructions in navigable streams. The

Act definitely contemplates a dual system of control by both the State and the Federal Government. The legislative history of the Act amply sustains this intention on the part of Congress in the enactment of the Act.

II.

Furthermore, the petitioner is not entitled to judicial review in the Courts of the order of the Power Commission denying its application for a license. The petitioner ignored the Iowa statutes as contained in Chapter 363 of the Code of Iowa, 1939, and made no attempt to comply with those provisions of State law. Petitioner merely claims that the State laws are invalid and that therefore it is not required to recognize them or to comply with them, notwithstanding the plain language of Section 9(b) of the Federal Power Act. General allegations that there is a conflict between the State law and the Federal law raise an issue too vague and ill-defined to admit of judicial determination. The issues in this case show no invasion of the sovereign rights of the United States, and such rights are not shown to be threatened. The control of navigation by the United States may be threatened by the imminent construction of the dam but not by permission to construct it. To pre-determine even the limited field of water power rights of different sovereigns pregnant with future controversies, is beyond the judicial function. The Courts deal with concrete legal issues presented in actual cases, not abstractions. The United States Court of Appeals did not abuse its discretion in refusing to pass upon the validity of the statutes of the State of Iowa.

III.

The petitioner's argument does not sustain its contentions. Section 23(b) of the Federal Power Act was an amendment enacted long after the enactment of the Federal Power Act for the purpose of clarifying the application of

the Act in border line cases and in cases where commerce and navigation were affected by obstructions in non-navigable streams. The section does not state the basic principles and requirements for the obtaining of a license by an applicant therefor.

The cases cited by petitioner do not sustain its position in that they all involve situations where a State permit or license had already been obtained, and the only question was whether or not the proponents of the project were subject also to the Federal Power Act. There is no issue joined in any of these cases cited by petitioner showing a conflict between the State and the Federal Government. Therefore, they are not applicable to the issues in the case at bar.

The presentation by petitioner that the history of the Bill through Congress shows an intention on the part of Congress to preempt the entire field is not borne out by the record. The citations from the Congressional Record and from the Committee record in Congress sustain the decision and opinion of the lower Court and the contention of the State of Iowa.

The petitioner takes the position that it is standing in the place of the Federal Government as though the Federal Government were seeking to construct the project. The Federal Power Act does not invest an applicant with the powers of the Federal Government. The Federal Power Act is restrictive in nature and a license under it is restrictive.

The United States Court of Appeals did not err in affirming the judgment of the lower Court and its opinion and decision should be affirmed by this Court.

ARGUMENT.

The opinion of the United States Court of Appeals in this case is set out in full in the Transcript of the Record commencing with page 43. It is reported in 151 F. (2d) 20. That opinion is a very thorough statement of the applicable principles of law and they are sustained by ample citations of authority. The State of Iowa submits that that opinion alone is a sufficient brief and argument to sustain the propositions asserted by the State of Iowa to require and to warrant its affirmance by this Court.

I.

A. SECTION 9(b) OF THE FEDERAL POWER ACT REQUIRES SUBMISSION TO THE COMMISSION OF SATISFACTORY EVIDENCE THAT APPLICANT HAS COMPLIED WITH THE APPLICABLE STATE LAWS AS A PREREQUISITE TO THE GRANTING OF A LICENSE BY THE COMMISSION.

Section 4(e) of the Federal Power Act (16 U.S.C.A. 797(e)) authorizes and empowers the Federal Power Commission among other things, to issue licenses to citizens of the United States, or to any association of such citizens of the United States, or to any corporation organized under the laws of the United States or of any State thereof, or to any State or municipality "for the purpose of constructing, operating and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works, necessary or convenient for the development and improvement of navigation and for the development, transmission and utilization of power across, along, from and in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce". There are several restrictive provisos stated in the Section.

Section 4(f) (16 U.S.C. 797(f)) provides that the Commission shall have the power to issue preliminary permits for

the purpose of enabling applicants for a license "to secure the data and to perform the acts required by Section 9 (802) of this Title; Provided, however, that upon the filing of any application for a preliminary permit by any person, association or corporation, the Commission, before granting such application, shall at once give notice of such application in writing to any State or municipality likely to be interested in or affected by such application".

Section 9(b) (16 U.S.C.A. 802) of the Federal Water Power Act is the Section which is primarily involved in this proceeding. It provides as follows:

> "Each applicant for a license under this Chapter shall submit to the Commission—
>
> (b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting and distributing power, and in any other business necessary to effect the purposes of a license under this Chapter."

The petitioner ignored the provisions of Section 9(b) and admitted both before the Power Commission and the United States Court of Appeals that it had not complied with the requirements of the laws of the State of Iowa "with respect to bed and banks and to the appropriation, diversion and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting and distributing power". The petitioner takes the position that although the State of Iowa has provisions of law applicable to the development and regulation of water power in its streams as contained in Chapter 363 of the Code of Iowa, 1939, said provisions of the Iowa law are invalid in that the Federal Government by the enactment of the Fed-

eral Power Act has completely and fully taken over the entire field. As stated in the opinion by the Court of Appeals, petitioner argues that (1) no applicable Iowa law requires one in its position to secure a permit and (2) if the Iowa law is intended to be applicable it is unconstitutional and compliance cannot be required.

The State of Iowa submits that the language of Section 9(b) of the Act is plain and unequivocal. Obviously Congress by this language created a condition precedent to the granting of a license by the Commission which is mandatory and which in effect is jurisdictional. *United States* v. *West Virginia*, 293 U.S. 463 at 472, 79 L. Ed. 1546, 1552. This Court speaking through Mr. Justice Stone in that case referred to the fact that Section 9(b) of the law makes the obtaining of a State license a prerequisite to the obtaining of a Federal license. It is therefore plain that Congress by this language expressly required as a prerequisite to the granting of a license by the Commission, compliance with the laws of the State where the project is to be located "with respect to bed and banks, and to the appropriation, diversion, and use of water for power purposes, and with respect to the right to engage in the business of developing, transmitting and distributing power".

B. LAWS OF THE STATE OF IOWA.

The applicable provisions of the Iowa law are contained in Chapter 363 of the Code of Iowa and are set out commencing with page 9 of the Appendix to the Brief for the Petitioner. It is therefore not necessary to re-copy those provisions of the Iowa law into our brief.

It will be observed that Section 7767 of the Iowa law provides as follows:

> "Prohibition—permit. No dam shall be constructed, maintained, or operated in this state in any navigable or

meandered stream for any purpose, or in any other stream for manufacturing or power purposes, nor shall any water be taken from such streams for industrial purposes, unless a permit has been granted by the executive council to the person, firm, corporation or municipality constructing, maintaining, or operating the same. (R60, Sec. 1264; C73, Sec. 1188; C97, Sec. 1921; C24, 27, 31, 35, Sec. 7767.)

Section 7768 provides that an applicant shall make application for a permit to the Executive Council of the State of Iowa which is composed of the Governor, the Secretary of State, the Auditor of State, the Treasurer of State, and the Secretary of Agriculture. It is required that this application shall contain certain information such as the name of the navigable or meandered or other stream involved, a description of the site for the dam and the names of the riparian owners affected; the purpose for which the dam is to be constructed including the use to which the water is to be put, a general description of the dam, raceways, canals and other constructions including the specifications as to the material and plan of construction, and a general description of all booms, piers and other protection works proposed to be erected; the approximate amount of hydraulic power that the dam is capable of developing, and the amount of power to be used; a map or blueprint showing the lands that may be affected and the ownership of each tract of land within the affected area, and such other additional information as the Executive Council may require.

Section 7769 provides the notice and the method of giving notice of the hearing and Section 7770 provides for the hearing and the taking of evidence.

Section 7771 provides as follows:

"When Permit Granted. If it shall appear to the council that the construction, operation, or maintenance of the dam will not materially obstruct existing navi-

> gation, or materially affect other public rights, will not endanger life or public health, and any water taken from the stream in connection with the project is returned thereto at the nearest practicable place without being materially diminished in quantity or polluted or rendered deleterious to fish life, it shall grant the permit, upon such terms and conditions as it may prescribe. (R60, Sec. 1269; C73, Secs. 1193, 1198; C97, Sec. 1930; C24, 27, 31, 35, Sec. 7771)."

It will be further noted that in cases where the water is to be used for manufacturing purposes the Executive Council shall not grant a permit until the applicant has presented a Certificate of the State Department of Health showing its approval of the use of the water for the purposes specified.

Section 7776 enjoins the duty upon the Executive Council to investigate the whole project so as to determine the best methods to conserve and protect as far as possible all public and riparian rights in the waters of the State and "to protect the life, health, and property of the general public". There are also provisions for the exercise of eminent domain and the condemnation of property necessary for the project.

Further, Section 7796 of the Code of Iowa provides as follows:

> "State Lands. Whenever the erection of any such dam will affect highways or state-owned lands, the applicant shall as a condition precedent secure a permit from the board, commission, or other official body charged with jurisdiction over and control of said highways or state-owned lands. (C24, 27, 31, 35, Sec. 7796)."

It will be observed that there are laws of the State of Iowa such as are referred to and described in Section 9(b) of the Federal Power Act. These laws enjoin upon the Executive Council the duty to protect the general public and the citizens of the State with respect to bed and banks and

to the appropriation, diversion and use of water for power purposes and for any other purpose. The Iowa statutes require not only concern and supervision over the general welfare of the citizens of the State but the protection of the public and private property and health and recreational matters. These matters are all a part of the police power of the State.

There can be no question but that these provisions of the Iowa law are of the character and kind, compliance with which are required by the plain language of Section 9(b) of the Federal Power Act.

As heretofore stated, the proposed project will inundate and destroy portions of paved primary United States and State Highways such as to require rerouting and new construction at great cost. The Cedar River is used by many cities and towns along its course for the carrying away of sewerage from those cities and towns. The City of Waterloo, having a population in excess of 51,000, Cedar Rapids, having a population in excess of 62,000, and Vinton, having a population in excess of 4,000, all use the Cedar River for their sewerage disposal. Obviously the damming up of this river and creating a large lake above the dam as proposed herein, and the only outlet thereof being a canal to the Mississippi River, undoubtedly would cause a health hazard because of this sewerage in the river which would thus be impounded. It is admitted by petitioner that it did not comply with Section 7796 of the Iowa law providing that where highways and State owned lands are affected, an applicant shall as a condition precedent secure a permit from the State Highway Commission which has charge of the primary highways of the State, and from the State Conservation Board which has supervision over the recreational, game and fishing facilities of the State. Compliance with Section 7796 is a prerequisite to obtaining a license from the Executive Council under the provisions of Chapter 363 of the Code of Iowa, and

petitioner admits that it has not even attempted to comply with any of those provisions of the Iowa law.

As stated in the opinion by the United States Court of Appeals herein (T. 46) "In enacting the Federal Power Act, it was not the intention of Congress that the Federal Government should occupy the field completely, or that the States should be excluded. On the contrary, the Act contemplates a dual system of control and the exercise of appropriate powers by the State, as well as by the Federal Government. This is the plain purpose of Section 9(b). It is revealed also, by other sections of the Act." This pronouncement by the Court of Appeals is sustained by the language of this Court in *United States* v. *Appalachian Electric Power Company*, 311 U.S. 377, 428 and 429, 85 L. Ed. 243, 264.

The Federal Power Commission in its opinion filed in connection with its order dismissing petitioner's application, stated the following:

> "We have given careful consideration to the conflicting contentions of the applicant and the State of Iowa with respect to the applicability and effect of the Iowa statutes in this proceeding. But, as previously indicated, we are bound by the requirements of Section 9(b) of the Federal Power Act, which provides for submission to the Commission of satisfactory evidence that the applicant has complied with the State laws."

The Federal Power Commission has always taken the position that Section 9(b) of the Act requires a showing by satisfactory evidence that State laws such as are referred to in the Section, must be complied with as a prerequisite to the granting of a license by the Commission. Such an interpretation by the administrative body which presumably would be alert to exercising as much power as the law gives, it is significant in determining whether such power was actually conferred. *Federal Trade Commission* v. *Bunte Bros.*, 312 U.S. 349, 85 L. Ed. 881.

As stated by the Court of Appeals, "The fact that particular phases of an interstate activity have long been regulated by States, has been recognized as a strong reason why, in the continued absence of conflicting Congressional action, the State regulatory laws should be declared valid". *U. S.* v. *Southeastern Underwriters Association*, 322 U.S. 533, 548-549, N. 32.

Also as stated by the lower Court where the Federal law authorizes State action, such action is permissible even as to matters which could otherwise be regulated only by uniform national enactment. *Cloverleaf Butter Co.* v. *Patterson*, 315 U.S. 148, 155.

It is fundamental that the State may legislate concerning local matters which Congress could have covered but did not. *Hines* v. *Davidowitz*, 312 U.S. 52, 68. As stated, other provisions in the Federal Water Power Act indicate clearly that Congress did not intend to preempt and take over the entire field but intended to recognize certain rights of the State in the waters and rivers of the State.

The case at bar is different from the other cases in the books which have come to our attention in this respect. The petitioner here is attempting to force a license from the Federal Power Commission to build its project without reckoning with the applicable laws of the State of Iowa. Every other case involves basically a controversy with the Federal Power Commission as to whether the Federal Power Act applies and a license is required under it where the applicant has already procured and is acting under a license issued by the State under and by virtue of the State laws. The question in each of these cases is not whether the State law has been superseded but whether or not the claimant is subject also to the provisions of the Federal Power Act and must secure a license from the Federal Power Commission in addition to the rights obtained from the State.

The State of Iowa in this case is not contending that the petitioner herein must secure its license from the State instead of from the Federal Power Commission, nor does it contend that the Federal Power Commission in cases where the Federal Government has jurisdiction under the commerce clause of the constitution does not have jurisdiction. The State of Iowa contends merely that the Federal Power Act recognizes certain rights of the State of Iowa and that the Federal Power Act requires compliance with those designated laws of the State before the Federal Power Commission can take jurisdiction or can grant a license under its law. There is no conflict claimed by the State of Iowa in this case. It is possible and conceivable that if an application were made by the petitioner herein to the Executive Council for a permit under the State laws and a hearing is held, that a satisfactory plan might be worked out by which the State could issue a permit to the applicant. On the other hand, it is conceivable that the plan as described in the evidence before the Federal Power Commission might have to be altered to meet certain requirements of the State under its police power. It is also conceivable that a plan might be presented to the Executive Council of the State of Iowa which would be so injurious and contrary to the public interest as to require that the application be denied. There may be no conflict between the affirmative requirements and restrictions placed by the State upon the project with those placed upon it by the Federal Power Commission. Also, if the requirements of the State are no more strict than those of the Power Commission as to the proposed project, then there could be no controversy. The only opportunity for conflict would be where the State made an affirmative requirement and the Federal Power Commission made a contrary affirmative requirement in the operation and construction of the project. That question has not arisen in this case. It would have to be decided according to the existing situation when it does arise.

C. OTHER PROVISIONS OF THE FEDERAL POWER ACT CLEARLY DISCLOSE THE INTENTION OF CONGRESS NOT TO PREEMPT THE WHOLE FIELD.

There are many provisions in the Federal Power Act which indicate clearly that it was not the intention of Congress that the Federal Government should occupy the whole field completely and that the State should be excluded. The Act definitely contemplates a dual system of control by both the State and the Federal Government. See Sections 4(c), 4(f), 7(a), 10(e), 14, 19, 20 and 27; (16 U.S.C. Secs. 797(c), 797(f), 800(a), 803(e), 807, 812, 813 and 821.)

An examination of Section 27 (821) indicates clearly that Congress did not intend "in any way to interfere with the laws of the respective states relating to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." This language is broad and general. It effectively saves all State laws upon the subjects referred to. There can be no question but that the laws of the State of Iowa heretofore referred to relate to the control, appropriation, and use of waters for municipal as well as other uses. The State laws relative to the control of the waters of the Cedar River for sewerage disposal purposes are protected by this provision. The executive Council of Iowa is charged with the duty by the State laws hereinbefore described to protect the interests of the public and of the municipalities using that river. The Executive Council has the duty in the first instance to determine whether or not the petitioner's proposed project will interfere with the uses of the water by the public and by the cities and towns located along the Cedar River. Section 9(b) of the Water Power Act just as effectively requires compliance with the laws of the State referred to in Section 27 of the Act as it does with the laws of the State specifically referred to in Section 9(b).

We call attention to the amendment to Section 23 of the Federal Power Act by the Act of August 26, 1935 (16 U.S.C. Sec. 817). That Section merely provides in negative terms that it shall be unlawful for any person, State or municipality for the purpose of developing electric power, to construct, operate or maintain water conduits, reservoirs, power houses, transmission lines, or other project works incidental thereto, across, along or in any of the navigable waters of the United States except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to the Chapter. It is then provided that no such construction shall be undertaken in any stream or part thereof other than a navigable stream over which Congress has jurisdiction under the commerce clause of the Constitution, until a declaration of intention to so construct has been filed with the Commission. In this connection the Commission is required to investigate and determine whether interstate or foreign commerce would be affected and if the Commission so finds, then a license under the Federal Power Act must be secured, and if the Commission does not so find, then the statute gives permission to construct such dam or other project in such stream *upon compliance with the State laws.*

All of the opinions by the Courts touching upon this question sustain the position of the State of Iowa.

It will be well to note a few of the pronouncements upon the construction to be given to the Federal Power Act in view of the contention of the petitioner herein.

It has always been the established policy of this Court that an overriding Federal power will not be exercised except when Congress manifests a clear intent so to do. This rule was recently expressed in *Connecticut Light & Power Company* v. *Federal Power Commission*, decided March 26, 1945, and reported in 89 L. Ed. 691 at 700. This Court there said:

"We have said, and it is applicable to this case, that 'Where a Federal agency is authorized to invade an overriding Federal power except in certain prescribed situations and then to leave the problem to traditional state control, the existence of Federal authority to act should appear affirmatively and not rest on inferences alone'. *Yonkers* v. *United States*, 320 U.S. 685, 692, 88 L. Ed. 400, 404, 64 S. Ct. 327; *Florida* v. *United States*, 282 U.S. 194, 211, 212, 75 L. Ed. 291, 301, 302, 51 S. Ct. 119; cf. *Palmer* v. *Massachusetts*, 308 U.S. 79, 84, 84 L. Ed. 93, 97, 60 S. Ct. 34, 41 Am. Bankr. Rep. (N.S.) 134; *Federal Trade Commission* v. *Bunte Bros.*, 312 U.S. 349, 351, 85 L. Ed. 881, 883, 61 S. Ct. 580. Nothing except explicit findings excluding the grounds of state control gives assurance that the bounds of Federal jurisdiction have been accurately understood and fully respected, and that state power has been considerately and deliberately overlapped."

Again, in *United States* v. *West Virginia*, 295 U.S. 463 at 472, 79 L. Ed. 1546-1552, this Court interpreted the provisions of Section 9(b) of the Federal Power Act in accordance with the contention of the State of Iowa herein. In that case, the bill sought an injunction against the corporate defendants, restraining only the construction of the dam without a license from the Federal Power Commission. The Company had secured a license from the State of Virginia under the State laws. There was no contest between the State of Virginia and the Federal Power Commission as to whether the State law controlled or whether the Federal Power Act controlled. The Company asserted that having received its license from the State it was not required to secure one from the Federal Power Commission. In the course of the discussion this Court said:

"The bill seeks an injunction against the corporate defendants, restraining only the construction of the dam without a license from the Federal Power Commission. But *Section 9(b) of the Federal Water Power Act requires that every applicant for a license shall present*

*'satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power * * *'. The mere grant of the state license, which the Federal Water Power Act makes prerequisite to the application for the Federal license, cannot be said to involve any infringement of the federal authority.* It does not appear that the State has done more." (Italics supplied.)

In that case as in the case at bar, there was no threatened interference with the authority of the United States by the State.

In *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 434; 85 L. Ed. 243, 267, the authority and reserved powers of the States is recognized. It is there stated:

"The states possess control of the waters within their borders, 'subject to the acknowledged jurisdiction of the United States under the Constitution in regard to commerce and the navigation of the waters of rivers'. It is this subordinate local control that, even as to navigable rivers, creates between the respective governments a contrariety of interests relating to the regulation and protection of waters through licenses, the operation of structures and the acquisition of projects at the end of the license term. But there is no doubt that the United States possesses the power to control the erection of structures in navigable waters."

The rule is well stated again in *Illinois Central Railroad* v. *State Public Utility Commission*, 245 U.S. 493 at 510; 62 L. Ed. 425, 438, where it is said:

"In construing federal statutes enacted under the power conferred by the commerce clause of the Constitution * * * it should never be held that Congress intends to supercede or suspend the exercise of the

reserved powers of a State, even where that may be done, unless and except so far as, its purpose to do so is clearly manifested."

Again in the case of *Maurer* v. *Hamilton*, 309 U.S. 589, 614, 84 L. Ed. 969, 980, this Court stated the rule as follows:

> "As a matter of statutory construction congressional intention to displace local laws in the exercise of the commerce power is not, in general to be inferred unless clearly indicated by those considerations which are persuasive of the statutory purpose. This is especially the case when public safety and health are concerned."

Attention is further called to *Kelly* v. *State of Washington*, 302 U.S. 1, 9, 82, L. Ed. 3, 10, where it is specifically stated that the principle is thoroughly established that the exercise by a State of its police power which would be valid if not superceded by Federal action, is superceded only where the repugnance or conflict is so direct and positive that the two Acts cannot be reconciled or cannot consistently stand together. In this connection, we specifically call attention to the pronouncements in the opinion by the Court of Appeals in the case at bar and the citations of authority set out on page 51 of the Transcript of Record.

The legislative history of the Federal Power Act clearly discloses that it was not intended that the State laws, such as the laws of Iowa involved herein, were to be superseded by the Federal Power Act.

Petitioner has set out in the Appendix to its brief in this Court, commencing with page 18, what it terms Excerpts from a Thesis by a Mr. Snapp.

This Thesis purports to deal with the legislative history of the enactment of Section 9(b) of the Federal Power Act. We submit that after reading the material quoted in the Thesis, the conclusions of the writer are not borne out by the record. On the contrary, the findings by the United

States Court of Appeals in the opinion in the case at bar, and the contention of the State of Iowa herein are sustained.

We call attention to the statement of Mr. Houghton of New York in the hearing before the House Committee in the following respects:

> "* * * You provide here in Section 9 that each applicant shall submit to the commission certain things. It virtually follows that until he does do that the Federal Power Commission will not issue him a permit. I want to make sure that the permit will not be issued until he has complied with the requirements in the various States as they may exist at the time he makes his application." (Page 22 App. Petitioner's Brief.)

> "There are no public lands in New York State, and the only right the Federal Government has, if any, is under the commerce clause as to navigation." (Page 22 App. Petitioner's Brief.)

> "You say he shall submit satisfactory evidence. That means he has to comply with that condition before he submits his application." (Page 24 App. Petitioner's Brief.)

The foregoing are a part of the dialogue between Congressman Raker and Mr. Houghton. Mr. Raker was sponsoring an amendment which would change Section 9(b) and Mr. Houghton wanted 9(b) safeguarded so that there could be no question but that the State laws were protected.

Further, Representative Mondell appeared before the Committee and among other things stated the following:

> "This act should contain—and I suppose there will be no opposition to that on the part of anyone, as a somewhat similar provision was contained in the Ferris House bill; as exactly the same provision is in the reclamation law, and as the principle has been generally accepted and approved—some such provision as this: 'That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State relating to the control, appropriation,

use, or distribution of water'. That is the language, if I recall it rightly, of the reclamation law, and I think in substance the provision contained in the Ferris bill. That is simply a statement of facts. It is not a new law. It is simply recognition of the situation as a guide to administrative officers who sometimes forget very basic and fundamental things. They get views and theories that lead them far afield." (Page 25 Appendix, Petitioner's Brief.).

Mr. Raker of California offered an amendment which would modify the language of Section 9(b) of the Act. Mr. Mondell in commenting upon Mr. Raker's amendment in part, stated the following:

"Mr. Chairman, I hope the amendment offered by the gentleman from California (Mr. Raker) will not prevail. I think the gentleman must have offered his amendment under a misapprehension of the meaning and effect of the language of the provision. The gentleman is assuming that the language which he attempts to amend requires a completed waterright and a waterright certificate before the party shall be granted a license under this act or his application be considered. That is not true at all. The provision is that the applicant shall have complied with the laws of the State with respect to the appropriation, diversion, or use of water; that is, he shall have complied with all of the laws of the State applicable to the situation up to the time he makes his application. As was suggested a moment ago when the amendment offered by the gentleman from New Jersey (Representative Parker) was under consideration, there are other requirements of State law that will apply after the license has been granted and construction begins, requirements that will continue on through the period of construction and through the period of operation. This provision has no reference to such requirements. It simply requires that the State laws shall be complied with so far as the applicant can comply with them in the nature of things up to the time he makes his application." (Pages 30 and 31, Appendix, Petitioner's Brief.)

Mr. Mondell said more than is set out in the Thesis by Mr. Snapp. He stated also the following:

> "The provision is that the applicant shall comply with the State law. All that the gentleman from California wants him to do is to comply with the State law only so far as the making of the application is concerned. What benefit would it be to the commission that Jones, Smith, or Brown may have picked up a piece of paper and scribbled an application on it and put it in the mail, or perhaps filled out the proper application blank. That gets nowhere and accomplishes nothing. The law of the State is that he shall make his application with certain necessary data and that there shall be in response to that inquiry an investigation as to whether there is water available that can be used to turn a wheel without depriving some one else of a prior right and whether or not the conditions are such that under the State law such water can be used at that point for power purposes. After the license applicant has completed his waterright application he comes before the commission with his own data verified and full information obtained from the State and permission from the State to proceed, and applies for his license from the Federal Government. But the gentleman from California would cut all this procedure off immediately on the application to the State being made or notice posted on the bank of a stream in a hazel-brush patch, where nobody would see it. There would be nothing on which the commission could act, no procedure had which would inform the commission on questions of vital importance." (Congressional Record, Vol. 56, part 10, p. 9814.)

Mr. Sinnott in explaining the conference report of the Senate and House conferees to the House of Representatives specifically pointed out that States Rights were protected, citing Section 9(b) in connection therewith. He stated as follows:

> "Under this bill we respect the rights of the states. In fact, no license can be granted under this bill unless the applicant shows he has complied with the laws of the individual states." (Congressional Record, Vol. 59, part 7, page 6537.)

Mr. John W. Scott, a member of the Federal Power Commission in an article entitled "Is Federal Control of Water Power Development incompatible with State Interests" printed in 9 George Washington; L. Rev. 631 at 646, stated:

> "But notwithstanding the plenary power of the Federal Government over these water resources Congress in its wisdom has carefully refrained in the Federal Power Act from exercising its maximum constitutional authority over these resources or to limit the enjoyment of them by the people of the several states."
>
> "Federal control and 'states rights' in water power resources are compatible. The express provisions of the Federal Power Act impel that conclusion."

Mr. Scott in other parts of the Article cites Section 9(b) of the Federal Power Act as containing one of the limitations of the Federal authority and states that it is one of the protective provisions of state's rights.

In the Excerpts from Mr. Snapp's Thesis set out in the Appendix to Petitioner's Brief are references to statements made by Mr. LaFollette in support of the Act. Those statements sustain the position of the State of Iowa in the case at bar. Among other things Mr. LaFollette said:

> "* * * Under the proposed law the would-be licensee is supposed to have procured all concessions and necessary powers of the State or States in which the proposed project is situated before a license can be issued, thus harmonizing State and Federal interests, making development possible without either transgressing the sovereign powers of the States or conferring on the Federal Government any plenary power not contemplated by the Constitution. Under this bill we only allow the commission a supervisory power over those functions entirely within the State's jurisdiction for the period covered by any license, the State having exercised its right in advance of issue." (Page 27, Appendix to Petitioner's Brief.)

Section 9(b) as presented to the House was exactly as it now reads except that there was not included in the reference to the State laws the phrase "bed and banks". Mr. LaFollette wanted the law amended so as to include in the reference to State laws, the State laws relating to bed and banks as well as to the appropriation, diversion and use of water. In commenting upon his amendment and upon the effect of Section 9(b), Mr. LaFollette stated the following:

> "If we make it one of the conditions precedent to the procuring of a license that the applicant has complied with the requirements of the State law as to bed, banks, diversion, and use of water, we are most assuredly not infringing any State's right in that respect, but are definitely insisting that the State's rules of property as to water, bed, and banks must have been fully complied with or license can not issue." (Page 27, Appendix, Petitioner's Brief.)

Thus it will be observed that throughout the whole history of this legislation, Section 9(b) was carefully guarded and preserved to protect the rights of the States in the waters located within the States and it was intended just as Section 9(b) states, that an applicant for a license under the Federal Power Act must as a prerequisite thereto, first comply with the applicable State laws.

It is submitted that there can be no question in the light of both the legislative and Court history that the United States Court of Appeals for the District of Columbia was correct in its decision in these respects herein, and that that decision should be affirmed.

II.

THE PETITIONER HEREIN IS NOT ENTITLED TO A JUDICIAL REVIEW FOR THE REASON THAT IT HAS FAILED TO EXHAUST THE AVAILABLE ADMINISTRATIVE REMEDIES. THE RIGHT OF THE UNITED STATES TO CONTROL NAVIGATION IS NOT INVADED OR EVEN THREATENED IN THIS CASE.

As heretofore stated, the petitioner ignored the Iowa statutes requiring that it apply for a permit to construct the project under and in accordance with the laws of the State of Iowa. Petitioner takes the position that Section 9(b) does not mean what it says because the Federal Power Commission is given the power under the Federal Power Act to issue licenses and to prescribe conditions for the construction of projects such as it proposes. Petitioner argues that perforce it should not be required to secure licenses from both the State and the Federal Power Commission. As heretofore stated, there has been no conflict and there is no conflict between the State of Iowa and the Federal Power Commission. The State of Iowa is merely asserting that the petitioner must under the Federal Power Act and particularly Section 9(b) thereof first comply with the applicable State laws before applicant can secure a license from the Federal Power Commission if that Commission can be persuaded to grant one. The alleged controversy stated by petitioner therefore has no foundation. As stated by the United States Court of Appeals in its opinion herein "one who is required to take out a license will not be heard to complain in advance of application, that there is danger of refusal * * * he should apply and see what happens." (Tr. p. 55.) Citing *Highland Farms Dairy, Inc.* v. *Agnew*, 300 U.S. 608, 616-617. As heretofore stated, it is possible that the Executive Council and the petitioner might be able to work out a project for which the Executive Council of Iowa would issue a permit, but under the circumstances and the status of this case this

Court is not in a position to pass upon the question raised by petitioner. As stated in *United States* v. *West Virginia*, 295 U.S. 463, 473, 79 L. Ed. 1546, 1552, "The mere granting of a State license which the Federal Water Power Act makes prerequisite to the application for a Federal license, cannot be said to involve any infringement of the Federal authority. It does not appear that the State has done more."

Further, in *United States* v. *West Virginia*, *supra*, the following is stated:

> "General allegations that the State challenges the claim of the United States that the rivers are navigable, and asserts a right superior to that of the United States to license their use for power production, raise an issue too vague and ill-defined to admit of judicial determination. They afford no basis for an injunction perpetually restraining the State from asserting any interest superior or adverse to that of the United States in any dam on the rivers, or in hydro-electric plants in connection with them, or in the production and sale of hydro-electric power. The bill fails to disclose any existing controversy within the range of judicial power."

Further, in *United States* v. *West Virginia*, *supra*, this Court stated:

> "The sovereign rights of the United States to control navigation are not invaded or even threatened by mere assertions. It is, in this respect, in a position different from that of a property owner, who because of the adverse claims to ownership can neither sell his property nor be assured of continued possession. The control of navigation by the United States may be threatened by the imminent construction of the dam, but not by permission to construct it."

This subject was treated also by this Court in *United States* v. *Appalachian Electric Company*, 311 U.S. 377, 423, 85 L. Ed. 243, 261, where the following appears:

> "The briefs and arguments at the bar have marshaled reasons and precedents to cover the wide range

of possible disagreement between Nation and State in the functioning of the Federal Power Act. To predetermine, even in the limited field of water power, the rights of different sovereignties, pregnant with future controversies, is beyond the judicial function. The courts deal with concrete legal issues, presented in actual cases, not abstractions. The possibility of other uses of the coercive power of license, if it is here upheld, is not before us."

It is therefore submitted that petitioner is not entitled to challenge the validity of the statutes of the State of Iowa under the status of this record. The rule is well established that this Court will not undertake to construe the statutes of Iowa in the absence of a construction thereof by the Courts of Iowa. It was conceded upon the presentation before the United States Court of Appeals that there has been no construction of the provisions of Chapter 363 of the Code of Iowa of 1939 by the Iowa Courts. (Tr. p. 47.) *Alabama State Federation of Labor* v. *McAdory*, U.S. , 89 L. ed. 1270, 1282, S. Ct., ; *Asbury Hospital* v. *Cass County, N. D.*, U.S. , 90 L. ed. 1, 5, S. Ct.

If for no other reason than those advanced in this division of our argument, the judgment and decision of the United States Court of Appeals herein should be affirmed.

III.

REPLY TO PROPOSITIONS ARGUED BY PETITIONER.

A. In Division I of petitioner's argument it is stated that a State permit is not required for the construction of a proposed project under the provisions of Chapter 363 of the Code of Iowa because of the provisions of Section 23(b) of the Federal Power Act. Petitioner misconstrues and misunderstands the purport and meaning of Section 23 of the Federal Power Act. It will be observed that Section 23(b)

amends the original Federal Power Act and was enacted in 1935 after some experience and difficulty with companies who had constructed dams and projects in rivers over which Congress has jurisdiction under the commerce clause of the constitution prior to the enactment of the Federal Power Act and prior to June 10, 1920. It will be observed that many projects were authorized by separate and individual Acts of Congress and by various States. Section 23(b) was enacted to cover those situations and not for the purpose of changing the basic or fundamental law, nor of changing the relative rights of the States and of the Federal Government as stated in the original Act, but to extend the provisions of the Act to cover all previously built dams and projects. As stated, in *United States* v. *Appalachian Electric Power Co.*, C.C.A. Va., 1939, 107 F. (2d) 769, this Section gives the Federal Power Commission authority only over a stream over which Congress has jurisdiction under the commerce clause, with the purposes of taking care of proposed structure in non-navigable tributary of an interstate navigable stream, and of providing convenient administrative procedure to determine doubt whether navigable capacity of down-stream waters might be affected by a project, from the Government's standpoint, so that the project owner would know the Government's position in the matter.

Therefore, it is submitted that the provisions of Section 23(b) are supplementary to the other provisions of the Act and are definitive only of border line situations. There is nothing in Section 23(b) which affects or changes the requirements of Section 9(b) of the Act.

B. Petitioner states that Chapter 363 of the Iowa Code has no valid application where a license is required by the Federal Power Act. What we have heretofore said in the other divisions of our argument we believe fully covers this proposition. The attempt of petitioner to show a conflict

in the provisions of Section 23(b) of the Federal Power Act with the provisions of Chapter 363 of the Iowa Code is untenable.

Petitioner cites in support of its contention, *Wisconsin Public Service Corporation* v. *Federal Power Commission*, 147 F. (2d) 743, wherein the Company had secured a permit for the reconstruction of a dam from the State of Wisconsin. The Company took the position that inasmuch as the State of Wisconsin had granted its permit that the Federal Power Commission was without power to require the Company to take out a license under the Federal Power Act. The Court in its opinion cites Section 23(b) of the Federal Power Act, and refers to the contention of the Company that the Act does not apply to dams constructed prior to the passage of the Federal Power Act. The Court found that Section 23(b) extended the power of the Act over dams built prior to the enactment of the Federal Power Act and therefore held that the dam was subject to the provisions of the Act. The fact that the dam had been built under a State license issued prior to the taking effect of the Federal Power Act did not relieve the Company from the requirements of the Act. There is nothing in that decision which holds or states that a license issued by the State was ineffective and that the Company need not comply with State laws.

C. Petitioner in Division II of its brief reiterates its previous statement that Section 9(b) of the Federal Power Act does not require a permit from the Executive Council of Iowa as provided by Chapter 363 of the Iowa Code, because petitioner claims Congress has taken complete control over power projects coming within its jurisdiction. Counsel argues that to require a permit from the State and a license from the Commission creates a dual authority which cannot be reconciled. Again we state that petitioner is forgetting the question. There is no contest and no issue existent be-

tween the State of Iowa and the Federal Power Commission under the Federal Power Act. There may never be any difference of opinion. In practically every case which has reached the Courts, there has been a State license and a Federal license has been required in addition to the State license. We are not aware of any case where a conflict has appeared between the requirements of the State and the requirements of the Federal Power Commission. Therefore, the question is moot in so far as the case at bar is concerned.

Counsel refers to the statement of Congressman Raker who was attempting to secure an amendment which radically changed the provisions of Section 9(b). What he had to say was in the light of a particular California law and Congress rejected Congressman Raker's interpretation and his amendment.

Petitioner states that the Federal Power Commission is ready to issue a license. There is no language in the opinion which justifies that assertion. The Federal Power Commission is in no position to determine whether it is ready to issue a license until the requirements of the Federal Power Act have first been complied with and particularly until Section 9(b) of the Act has been complied with. The questions raised by petitioner are legislative in character and not judicial. If petitioner does not like the requirements of Section 9(b) it should attempt to have them removed in the legislative halls rather than by judicial construction.

Petitioner cites *United States* v. *Appalachian Electric Power Company, supra*, as sustaining its position. As heretofore indicated the opinion in that case sustains the position of the State of Iowa and the opinion and decision of the United States Court of Appeals herein is in accord with the applicable parts of the opinion in *United States* v. *Appalachian Electric Power Company, supra*. We have no quarrel as an abstract proposition with the quotations from that decision.

Petitioner cites *United States* v. *Bellingham Bay Boom Co.*, 176 U.S. 211, in which the Court recognizes the power and authority of Congress to exercise plenary and exclusive control over obstructions and improvements in navigable waters of the United States. We have no quarrel with the quotation from that decision. Petitioner overlooks the fact that in every one of these cases and in every case where a question of the power of the Federal Government is raised, the question is a negative one and one where the Court is asserting the power of the Government to *prevent* obstructions in navigable waters of the United States. In no case is there an assertion of an affirmative power to require or to force the building of an obstruction in a navigable water contrary to and in violation of the laws of the State in which it is located. As stated by the United States Court of Appeals in its opinion "The present case involves no more than the expressly limited powers of a government agency to license a private corporation which seeks to operate under the restrictive provisions of the Power Act." (Tr. p. 70.)

D. In Division III of its brief, petitioner states that Section 9(b) of the Federal Power Act does not afford the basis for joint participation in the issuance of licenses for power projects upon the navigable waters of the United States by States and the Federal Government. The Court in its opinion in this case based its statement set out at the bottom of page 46 of the Transcript upon what this Court said in *United States* v. *Appalachian Electric Power Company*, 311 U.S. 377, at 428 and 429. Therefore, there can be no question about the soundness of the statement in the opinion. Further, counsel again in this Division contends that Section 23(b) of the Act is the key section of the law. We again submit that petitioner is in error in this assertion. Counsel also contend that the provisions of Section 9(b) can apply only to situations which exist in Western states where

water for irrigation of arid lands is of vital public importance. There are no limitations of any such character in the language of Section 9(b).

Counsel cites a case which arose in 1912 in California entitled *Imperial Water Co. No. 5* v. *Holabird*, 197 Fed. 4. We can see no application whatsoever to what is said in that case to the situation in the case at bar.

Also, petitioner cites *Eastern Oregon Land Co.* v. *Willow River Land & Irrigation Co.*, 204 Fed. 516, an Oregon case which arose in 1913. Neither do we see any application in that case to the situation involved in the case at bar.

Counsel also refers to the statements by Representative LaFollette in connection with the bill. Mr. LaFollette was referring primarily to his amendment to include in the comprehensive language of Section 9(b) the State laws relative to beds and banks of rivers. There is nothing in what he said which detracts at all from the rest of the provisions of Section 9(b).

The petitioner also refers to the statements of Congressman Mondell. We submit that Congressman Mondell's statements when read as a whole agree with the interpretation made by the lower Court in its opinion herein, and the contention of the State of Iowa in this case. We refer the Court to our affirmative argument upon this legislative history.

Again, petitioner refers to the case of *Henry Ford and Son, Inc.* v. *Little Falls Fibre Co., et al.*, 280 U.S. 369. That case has no application to the case at bar. It involved damages to property rights of users of the water above the dam in question, and the Court in that opinion was discussing the right of the upper riparian user of the water for damages because of the destruction of that use. There is nothing in the opinion in that case which gives sustenance to petitioner.

Petitioner next tries to avoid the effect of *United States* v. *West Virginia, supra.* There can be no question about the

application of the language of the Court in that case to the situation in the case at bar. In the *West Virginia* case the Company was trying to avoid compliance with the Federal Power Act. The Company had already complied with the laws of the State of Virginia. This Court held that it not only had to comply with the laws of Virginia as a prerequisite to its application for a Federal license, but that the Federal Power Act also applied to it. There is no sustenance in this case for petitioner either.

On page 43 of its brief, petitioner states that the State of Iowa contends that it has the right to prohibit and prevent the construction within the State of a "Federal project" under a Federal license. Counsel for petitioner is again arguing as though a permit-holder under the Federal Power Act authorized to construct a private project assumes the prerogatives of the Federal Government under the commerce clause. That is not true. Petitioner's proposed project is not a Federal project. There is no such an issue in this case. The Ninth Circuit Court in *United States* v. *Central Stockholders Corporation of Vallejo*, 52 F. (2d) 322, stated:

> "The Supreme Court held in the *Ford* case, (*Ford & Son* v. *Little Falls Co.*, 280 U.S. 369, 50 S. Ct. 140, 74 L. Ed. 483) in effect, that it was not the intention of Congress to vest any portion of its sovereign power in the permittee, and, assuming that the government might have exercised its control over navigable streams by and through a permittee under the Federal Water Power Act, that it was not the intention of the Government so to do."

The present case does not involve any such an issue or question. Therefore all of the argument of petitioner in Division III of its argument is beside the point and is strained innuendo which cannot stand up in the light of the plain and unequivocal language of Section 9(b) of the Federal Power Act.

E. In Division IV petitioner complains that under no circumstances would it be required to comply with Section 7796 of the Code of Iowa which provides that before an applicant can be given a permit by the Executive Council of Iowa, the applicant shall first secure a permit from the Board, Commission, or other Federal body charged with jurisdiction over and control of the highways or state-owned lands. As heretofore stated, the proposed project would inundate several paved primary highways of the State and thus interfere with highways under the jurisdiction of the State Highway Commission, and would interfere with the existing recreational and fishing facilities in the Cedar River which are under the jurisdiction of the State Board of Conservation. Obviously in order to secure a permit from the Executive Council of the State of Iowa under the provisions of Chapter 363 of the Code of Iowa, petitioner would have to clear with the State Highway Commission and the State Board of Conservation.

F. Counsel contends that the lower Court erred in concluding that the Commission properly insisted upon a good faith effort by this applicant to comply with the State law. That statement taken with the other pronouncements in the opinion clearly indicate that the Court is holding that Section 9(b) requires compliance with the applicable laws of the State of Iowa as a prerequisite to the issuance of a license by the Federal Power Commission. Counsel is indulging in a play upon words. We do not deem this Division worthy of any further reply.

It is submitted that the petitioner has failed to sustain its contentions and has failed to show that the United States Court of Appeals for the District of Columbia erred in its opinion and decision herein.

CONCLUSION.

In concluding the brief of the State of Iowa, Intervenor, it is submitted that the opinion and decision of the United States Court of Appeals for the District of Columbia herein should be affirmed. Petitioner has failed to show any legitimate or sound reason for a reversal.

It will be noted that the project proposed here completely cuts off the lower twenty-nine miles of the Cedar River and completely destroys any possible navigation upon that River. The sole purpose of the project is to construct a power plant to produce electric current to be sold commercially.

As stated by this Court in *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 426, 85 L. Ed. 213, 262;

> "As respondent soundly argues, the United States cannot by calling a project of its own, 'a multiple purpose dam,' give to itself additional powers, but equally truly the respondent cannot, by seeking to use a navigable waterway for power generation alone, avoid the authority of the Government over the stream. That authority is as broad as the needs of commerce. Water Power development from dams in navigable streams is from the public's standpoint a by-product of the general use of the rivers for commerce."

The petitioner is here seeking "to use a navigable waterway for power generation alone." The commerce power is linked specifically with navigation and navigability. Obviously a project which completely destroys any semblance of navigation is not an aid to navigation or to commerce.

Counsel for petitioner has persistently asserted that the Cedar River is a navigable river because the Commission made such a finding in an ex parte proceeding without judicial notice. That question may or may not be important under the questions properly before this Court. However, we desire to call the attention of the Court to the fact that the Cedar River is located in the State of Iowa and joins the Iowa River

in the State of Iowa. The Iowa River from the point of the junction of the Cedar River with it, flows into and joins the Mississippi River. Congress found that the portion of the Iowa River below the junction with the Cedar River is non-navigable. Therefore, that part above the Iowa River would be non-navigable because interstate commerce could not get out of the Cedar River into the Mississippi River through a non-navigable stretch. Attention is specifically called to the following Acts of Congress:

> "Acts of Congress of May 6, 1870. (Iowa River.) So much of the Iowa River within the State of Iowa, as lies north of the town of Wapello shall not be deemed a navigable river or public highway, but dams and bridges may be constructed across it." (Rev. Stat. 1878, Sec. 5278, U.S.C.A. Title 33, Sec. 31.)

> "Acts of Congress of Aug. 18, 1894. So much of the Iowa River within the State of Iowa as lies between the town of Toolsboro and the town of Wapello in the County of Louisa, shall not be deemed a navigable river or public highway, but dams and bridges may be constructed across it." (Chap. 299, 53rd Congress, 2nd Session, U.S.C.A. Title 33, Sec. 31.)

Further, the matter of the navigability of the Cedar River was before the Federal Power Commission in 1922 in a proceeding entitled "Declaration of Intention of Iowa Railway and Light Company to Construct a Dam on the Cedar River". The minutes of the Commission on March 27, 1922, state:

> "In the matter of the Declaration of Intention by the Iowa Railway and Light Company of Cedar Rapids, Iowa, to construct a dam across and in Cedar River at a point about three miles above Rochester, Cedar County, Iowa, the Commission having caused the matter to be investigated, and it appearing from the report of such navigation that Cedar River is not a navigable water of the United States and that the proposed construction will not affect interstate or foreign commerce, it was voted that the Commission finds that the interests of

interstate or foreign commerce would not be affected by such proposed construction.

Given under my hand and the seal of the Federal Power Commission.

(signed) O. C. Merrill,
(Seal) Executive Secretary.
Federal Power Commission U.S.A."

Thus it will be observed that Congress has declared by law that the waters below the proposed project are non-navigable, and the Federal Power Commission has declared that the waters above the proposed project are non-navigable. These matters were in the record before the Power Commission. Therefore, there is serious question about the whole thing. However, the question is not important at this time for the reason that the basic questions are whether the petitioner has complied with the requirements of Section 9(b) of the Federal Power Act and whether or not petitioner can maintain this action in view of the status of the record.

It is therefore submitted that the judgment and opinion of the United States Court of Appeals of the District of Columbia herein should be affirmed for all of the reasons hereinbefore stated.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 603.

FIRST IOWA HYDRO-ELECTRIC CO-OPERATIVE,
Petitioner,

vs.

FEDERAL POWER COMMISSION,
Respondent,
STATE OF IOWA,
Intervenor.

REPLY BRIEF FOR STATE OF IOWA, INTERVENOR, TO BRIEF FOR FEDERAL POWER COMMISSION.

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REPLY BRIEF FOR STATE OF IOWA, INTERVENOR, TO BRIEF FOR FEDERAL POWER COMMISSION.

The State of Iowa received an advance typewritten copy of the brief for the Federal Power Commission after the brief for the State of Iowa was printed and filed herein. The brief for the Federal Power Commission is divided into three divisions. Divisions I and II support the opinion and decision of the United States Court of Appeals for the District of Columbia herein and request that the opinion and decision of the lower Court be affirmed. Division III is a presentation in the alternative, stating that if this Court should decide to pass upon the constitutionality of the Iowa statutes as contained in Chapter 363 of the Iowa Code, then Division

III of the Commission's brief is submitted on that proposition. It attacks the constitutional validity of Section 7771 of the Code of Iowa which is a part of Chapter 363 of the Iowa Code. Because of what is said by counsel for the Commission in Division III of the Commission's brief, the State of Iowa deems it necessary to reply thereto.

A. CONSTITUTIONALITY OF IOWA STATUTES IS NOT PROPERLY BEFORE THIS COURT.

The State of Iowa submits that this Court should not in this case consider or determine the constitutional validity of the Iowa laws, for all of the reasons stated in the brief for the State of Iowa filed herein, and for the affirmative reasons stated in Divisions I and II of the brief filed for the Federal Power Commission.

The rule is as stated by this Court in *Alabama State Federation of Labor* v. *McAdory*, ... U.S. ..... 89 L. Ed. 1270, 1279, which is as follows:

> "When a statute is assailed as unconstitutional we are bound to assume the existence of any state of facts which would sustain the statute in whole or in part. *Metropolitan Casualty Ins. Co.* v. *Brownell*, 294 U.S. 580, 584, 79 L. Ed. 1070, 1072, 55 S. Ct. 538 and cases cited; *United States* v. *Carolene Products Co.* 304 U.S. 144, 152, 153, 82 L. Ed. 1234, 1241, 1242, 58 S. Ct. 778."

The United States Court of Appeals for the District of Columbia in its opinion herein stated the following:

> "Petitioner's contention—upon the ground of unconstitutionality—depends also upon the assumption that the disputed Iowa Code Sections constitute an absolute bar to its project, hence that their effect is to defeat the jurisdiction of the Federal Government and the purposes of the Power Act. This contention must be rejected, also. It is the duty of Courts to avoid the issue of constitutionality if the statute which is being interpreted is susceptible of any reasonable interpretation consistent

with constitutionality. All parties agree that Iowa's courts have not, so far, been faced with this issue. We see several possible interpretations of the disputed Sections which would avoid the issue. * * * Again it will be noticed that Section 7771 is so phrased as to vest large discretion in the Executive Council. * * * it is entirely within the range of probability that a court would so interpret the first Section (7771) as to allow the issuance of a permit without strict compliance with all of its terms, especially if it were necessary to do so in order to avoid constitutionality." (R. 17, 18.)

We submit that the foregoing quotation from the opinion of the Court of Appeals in the case at bar correctly states the rules of law applicable, and it will be noted that each statement is amply supported by the decisions and opinions by this Court cited in the footnotes. Further, the Court of Appeals in its opinion stated the following:

"* * * it was not the purpose of Congress that the Commission should ride roughshod over any state, whatever the nature of its water laws, or give to a private corporation, licensed by it, the plenary power of eminent domain, unless that corporation had first subjected itself to the state controls which protect the rights, powers, privileges and immunities of its other citizens. Carrying petitioner's argument to its logical conclusion, it would follow that if the Commission could be persuaded to make appropriate findings, a licensee might, by so specifying in its application, take over the State House for its headquarters office or flood the capital city for a storage basin." (R. 66, 67.)

Further, we call attention to the following language in the opinion of the lower Court in this case:

"It may be noted in passing that we are not concerned in this case with a situation in which Congress has elected to exercise the full power delegated by the Constitution. The present case involves no more than the expressly limited powers of a government agency to license a private corporation which seeks to operate under the restrictive provisions of the Power Act. Need-

less to say, no findings or decision of the Commission could enlarge the scope of the Act or increase the Commission's power under it." (R. 70.)

We have set out the foregoing quotations from the opinion in the case at bar to specifically present to this Court the view of the United States Court of Appeals as to the constitutional question and as to the scope of the Federal Power Act, in the exercise of the power of Congress under the commerce clause of the Constitution. We submit that the lower Court was correct in its pronouncements and especially in the light of the record in the case at bar.

We invite the attention of the Court to the existing situation.

Note that it is conceded by petitioner and by the Federal Power Commission that petitioner did not apply to the Executive Council of the State of Iowa for a permit under the provisions of Chapter 363 of the Code of Iowa to construct and maintain the project in question. Note further that the petitioner took the position before the Commission that its proposed project was not subject to the laws of the State of Iowa as contained in Chapter 363 of the Code of Iowa, and that therefore there were no applicable State laws compliance with which is required by the provisions of Chapter 9(b) of the Federal Power Act. Note further that there has been no interpretation or construction of the provisions of the Iowa law as contained in Chapter 363 of the Code of Iowa by either the Iowa Courts or any other Court. The lower Court properly took the position that petitioner cannot complain of the Iowa laws in advance of making an application on the ground that there is danger of refusal. It should apply and see what happens. (R. 55.)

As stated in the quotation from the opinion of the Court of Appeals set out above, the Executive Council of Iowa may interpret the provisions of the Iowa law and may administer

them in such a way as that the laws and the administration of them would be constitutional. If the Executive Council of Iowa should administer the State laws in an unconstitutional manner that is another question. The laws would be constitutional but the administration of them might not be constitutional. Those questions would be determined upon the facts as they arise. The Power Commission correctly ruled that it was for the Courts to determine the validity of the State statutes under the Federal rules. Federal Courts will not undertake to construe or determine the constitutionality of State statutes as an abstract proposition and where there has been no opportunity afforded State Courts to interpret the State statutes.

These rules of construction were very thoroughly considered and ample precedent cited by this Court in the recent case cited above of *Alabama State Federation of Labor* v. *McAdory*, U.S. , 89 L. Ed. 1270, 1277. You there state that this Court is without power to give advisory opinions, and that it has long been the considered practice not to decide abstract hypothetical or contingent questions or to decide any constitutional question in advance of the necessity for its decision.

It is also stated in the last cited opinion that:

> "A law which is constitutional as applied in one manner may, it is true, violate the Constitution when applied in another. (Citing authorities.) But 'Since all contingencies of attempted enforcement cannot be envisioned in advance of those applications' this Court has felt bound to delay passing on 'the constitutionality of all the separate phases of a comprehensive statute until faced with cases involving particular provisions as specifically applied to persons who claim to be injured.'" (89 L. Ed. 1277.)

We call attention to your pronouncement in the recent case of *Asbury Hospital* v. *Cass County, North Dakota*, U.S. , 90 L. Ed. 1, 5, where the following appears:

"We are thus asked to pass on the constitutionality of a possible application of the State statute in advance of its application to appellant, and of its authoritative construction by the State Courts. Lacking such construction, without which no constitutional question can arise, the issue is not an appropriate one for adjudication by the declaratory judgment procedure. This Court is without power to give advisory opinions. It will not decide constitutional issues which are hypothetical, or in advance of the necessity for deciding them, or without reference to the manner in which the statute, whose constitutional validity is drawn in question, is to be applied." (Citing authorities.)

So we submit that this Court under the record in this case is not in a position to pass upon or to determine the constitutional validity of the Iowa statutes, and that that question is not now properly before this Court.

B. CONGRESS HAS NOT ASSUMED ALL OF THE POWERS GRANTED BY THE COMMERCE CLAUSE, IN THE FEDERAL POWER ACT.

Counsel for the Federal Power Commission argue to the effect that the Federal Power Act actually assumes all of the powers of Congress given by the commerce clause of the Constitution. That is not true. The Federal Power Act, while it involves and has for its purpose generally a comprehensive plan, yet is restrictive in nature. Prior to the enactment of the law various interests were securing permits and licenses from the respective States, and approval by the War Department under the Rivers and Harbor Act which were not uniform in nature and not calculated to develop a unified system and plan. Congress expressly had it in mind to unify the procedure not only so that there would be some control over obstructions being placed in the waters over which Congress had jurisdiction but also to give some assurance to interests who secured licenses and rights that they would be protected within the limits prescribed by the Power Act.

It will be noted as pointed out in our original brief, that all of the cases which have come before this Court have involved the question not whether compliance with State laws was required but whether after complying with State laws the parties involved were required to comply also with the Federal Power Act. All that is said in the opinions by this Court and other Courts is relative to the power of Congress to control, regulate and prohibit obstructions in the waters over which Congress has or may exercise control under the commerce clause.

Counsel for the Commission cites *United States* v. *Appalachian Electric and Power Company*, 311 U.S. 377, 85 L. Ed. 253 as sustaining its contention that the Power Commission under the Federal Power Act has all of the powers vested in Congress by the commerce clause of the Constitution. A careful examination of the opinion of this Court in that case does not bear out this contention. True, in the opinion this Court states that Congress has very broad, general and plenary power under the commerce clause of the Constitution but those statements are made in the abstract and not in connection with the limitation expressed in the Federal Power Act itself. In the *Appalachian* case the respondents were challenging the power of Congress to provide in the Federal Power Act the things about which respondent was complaining. Respondent was not complaining that the Federal Power Commission was attempting to exercise powers which were not given the Commission by the law. So what is said in the *Appalachian* case must be considered in that light. And for the purpose of illustrating the point, we call attention to the following quotation from the opinion of this Court in the *Appalachian* case:

> "As respondent soundly argues, the United States cannot by calling a project of its own 'a multiple purpose dam' give to itself additional powers, but equally true the respondent cannot, by seeking to use a navigable water-

way for power generation alone, avoid the authority of the Government over the stream. That authority is as broad as the needs of commerce. Water power development from dams in navigable streams is from the public's standpoint a by-product of the general use of the rivers for commerce." (P. 426.)

Also in the *Appalachian* case this Court said:

"The state and respondent, alike, however, hold the waters and the lands under them subject to the power of Congress to control the waters for the purpose of commerce. The power flows from the grant to regulate, i.e. to 'prescribe the rule by which commerce is to be governed'. This includes the protection of navigable waters in capacity as well as use. This power of Congress to regulate commerce is so unfettered that its judgment as to whether a structure is or is not a hindrance is conclusive. Its determination is legislative in character. The Federal Government has domination over the water power inherent in the flowing stream. It is liable to no one for its use or non-use. The flow of a navigable stream is in no sense private property; 'that the running water in a great navigable stream is capable of private ownership is inconceivable.'" (Pp. 423, 424.)

We submit that this Court in the *Appalachian* case did not rule that the powers assumed in the Federal Power Act were co-extensive with all of the powers granted by Congress by the commerce clause, but that on the other hand the language indicates clearly that the Federal Power Act did not give to the Commission and did not preempt all of the powers of Congress in this respect.

The Federal Power Act is of limited application because by its provisions the Commission is vested with certain defined duties as contained in Section 4 of the Act. (16 U.S.C. 797.) It will be noted that the Commission does not have any right or power to initiate or authorize the building of dams or projects either in aid of navigation or for water

purposes. It will be noted further that the Commission is authorized to make investigations and to collect data concerning such matters and to report its findings and recommendations to Congress but the Commission itself is not given the power to initiate the construction of any projects. It will be noted in Section 4(e) that the Commission is authorized to issue licenses to those desiring to construct projects that are "necessary or convenient for the development and improvement of navigation and for the development, transmission and utilization of power, etc." Note further in Section 4(e) that it is provided that no license affecting navigable capacity or any navigable waters shall be issued until the plans have been approved by the Chief Engineer and the Secretary of War. The central theme is the protection of navigable capacity. Further it is provided in the following Sections of the law that licenses may be issued on terms and upon conditions, but in Section 9(b) (16 U.S.C. 802) it is specifically provided that each applicant for a license shall submit to the Commission satisfactory evidence that the applicant has complied with the requirements of the laws of the State within which the proposed project is to be located "with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes." Thus it will be observed that the Commission cannot proceed to issue a license until Section 9 and particularly 9(b) has been complied with. As pointed out in our original brief other provisions are also restrictive. It will be remembered that in this case a *private corporation* is seeking a license. No *private licensee* can inherit by virtue of a license issued under the Act all the powers of Congress under the commerce clause. A *private licensee* is in a very different position than the Government if the Government were building the project for governmental purposes under its constitutional authority. We respectfully refer the Court to the Tennessee Valley Authority and to the Denison Reservoir on the Red River

in Texas and Oklahoma projects both of which were authorized by special Acts of Congress. Federal projects can be built only by special Act of Congress not under the provisions of the Federal Power Act. Therefore, we submit that the lower Court correctly stated the rule of law applicable in the following language:

> "It may be noted in passing that we are not concerned in this case with a situation in which Congress has elected to exercise the full power delegated by the Constitution. The present case involves no more than the expressly limited powers of a Government agency to license a private corporation, which seeks to operate under the restrictive provisions of the Power Act." (R. 59.)

The State of Iowa desires to re-emphasize here that in this case it has no quarrel with the Federal Government. Neither does it here contend that the Congress does not have plenary and full power under the commerce clause of the Constitution. The State of Iowa reiterates that there is no conflict and no contest in so far as this case is concerned between the State and the Federal Power Act. No issue has arisen. There was no other course that the Federal Power Commission could follow than to hold that compliance by the petitioner with Section 9(b) of the Act is a prerequisite to the issuance of a license by the Commission to petitioner. Petitioner having failed to comply, the Commission was required under the law to deny the application. The United States Court of Appeals for the District of Columbia correctly stated the applicable principles of law in its opinion affirming the order of the Power Commission. We submit that the lower Court correctly refused to pass upon the constitutionality of the Iowa statutes under the record as it exists in this case, and we submit to this Court that this Court likewise is not in a position to consider or determine the constitutionality of the Iowa statutes, for all of the reasons stated herein.

It is again submitted that the judgment of the United States Court of Appeals for the District of Columbia herein should be affirmed.

Respectfully submitted,

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No. 603.

IN THE

Supreme Court of the United States

OCTOBER TERM 1945.

FIRST IOWA HYDRO-ELECTRIC CO-OPERATIVE,
Petitioner,

vs.

FEDERAL POWER COMMISSION,
Respondent,

STATE OF IOWA,
Intervenor.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

PETITION FOR REHEARING BY STATE OF IOWA, INTERVENOR.

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STATE OF IOWA,
Intervenor.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

PETITION FOR REHEARING.

The State of Iowa, Intervenor herein, respectfully petitions the Court for a rehearing of the issues and questions involved in this matter on the grounds hereinafter stated.

OPINION.

The opinion of this Court was written by Mr. Justice Burton and was filed April 29, 1946, and has not been reported.

GROUNDS FOR REHEARING.

The State of Iowa submits that a rehearing of this case should be ordered by the Court and that upon resubmission the issues should be reconsidered because of the following grounds and matters:

1. The opinion of this Court is founded upon erroneous assumptions of fact and law that the Cedar River is a navigable water of the United States.

2. The opinion of the Court wrongfully—(1) declares that the provisions of the Iowa law as contained in Chapter 363 of the Code of Iowa are not such State laws as are referred to in Section 9(b) of the Federal Power Act; (2) construes and defines the meaning of the Iowa laws when a construction thereof has not yet been made by the Courts of the State of Iowa, which construction by this Court under such circumstances violates all the precedents by this Court; and (3) ignores the mandate of Congress contained in Section 9(b) of the Federal Power Act which provides that each applicant for a license *shall submit to the Commission satisfactory evidence* that the applicant has complied with the requirements of the laws of the State not only with respect to bed and banks but also with respect to the appropriation, diversion, and use of water for power purposes, and with respect to the right to engage in the business of developing, transmitting, and distributing power.

3. The opinion of the Court states an untenable principle of law and erroneously construes the Federal Power Act in holding that the Federal Power Act authorizes and empowers the Commission to license and permit the destruction of an inland river of the State by a private corporation for a strictly private commercial purpose, and in holding that the sovereign State is helpless to do anything about it, regardless of the irreparable damage done to the State and its people by such a project.

4. The opinion errs in not affirming the decision of the Court of Appeals for the District of Columbia and the decision of the Federal Power Commission because the record of the proceedings before the Power Commission and as recited in the opinion of this Court shows clearly that the applicant has not complied with the provisions of the Federal Power Act nor the Rules and Regulations promulgated by the Federal Power Commission.

ARGUMENT.

Upon the original submission of this case the principal arguments were upon the construction of Section 9(b) of the Federal Power Act. A number of matters are emphasized in the opinion filed by this Court which were not particularly stressed upon the original submission and which therefore, because of the importance attached to them in the opinion, require further elaboration and consideration in order to attain a just and fair result.

The State of Iowa is interested in this proceeding not only because of the irreparable damage which will be done to the State of Iowa and its people if the project as proposed and as described in the opinion is constructed, but also because of the violence done to the sovereign States of these United States if the construction given the Federal Power Act by this Court in its opinion is to prevail. It is inconceivable that meaning can be read into the language of the Federal Power Act which will empower the Federal Power Commission, if it can be so persuaded by a private party, to license and authorize the destruction of beautiful and valuable rivers lying within the borders of a State by a private party for a private commercial purpose, and the State be rendered helpless to do anything about it or to prevent it.

We do not believe and can never be made to believe that the Cedar River is now or ever was navigable within the meaning of the commerce clause of the Federal Constitution. Whether the Cedar River be navigable or not navigable, there are reasons so impelling as to warrant and require a rehearing and finally a reversal of the decision of this Court.

We present the following arguments to sustain each of the grounds for rehearing above set out. Upon further argument on rehearing these matters will be greatly enlarged and further citations of authority presented.

I.

The Cedar River is Not a Navigable Water of the United States.

1. The opinion of the Court recites that on January 29, 1940, pursuant to Section 23(b) of the Federal Power Act, the First Iowa Hydro-Electric Co-operative, hereinafter referred to as the applicant, filed with the Commission a declaration of intention to construct and operate a dam and reservoir and hydro-electric plant on the Cedar River near Muscatine, Iowa. In this project there was to be no diversion of water. In the footnote on page 3 of the printed opinion of this Court, it is stated that on February 7, 1940, the Commission sent a notice to the Governor of Iowa of the filing of the original declaration of intention and invited him to present information and comments relative thereto, and that the State took no part in the proceedings. Note this was a run of the River project such as had been twice presented to the Executive Council of the State of Iowa, of which the Governor was a member, and authorization to construct the project twice denied by the Executive Council because the Executive Council found that that project was neither desirable nor adequate just as the Federal Power Commission found and as recited on page 9 of the printed opinion. Nearly

fourteen months thereafter and on April 2, 1911, and as stated at the top of page 2 of the printed opinion, the applicant filed with the Commission a supplemental declaration of intention to construct an enlarged project essentially like the one it now wishes to build which includes an almost complete diversion of the waters of the River through a canal to the Mississippi River, thus rendering the lower twenty-one miles of the Cedar River a dry run. We do not understand that there is any claim that there was ever any notice given to the Governor of Iowa of this changed project.

Thereafter and on June 3, 1911, the Commission made *ex parte* "findings" as set out on page 3 of the printed opinion. One was "That the Cedar River and Iowa River are navigable waters of the United States". It will be noted in the same findings "that the Commission found that the diversion of water from the Cedar River to the Mississippi River by means of the diversion canal would have a direct and substantial effect upon the Iowa River into which the Cedar River now flows; and also that if the project were constructed it would cause extreme fluctuation in the flow of the Mississippi River at Muscatine where the canal emptied and would substantially affect the navigable capacity of that River. Note that the Commission found that these fluctuations would be caused by the proposed project and that they would affect the navigability of the Mississippi River. The Commission does not find that the Cedar River as it now flows has any material effect upon the navigability of the Mississippi River. On the contrary the evidence upon the later hearing before the Commission indicated clearly that the water from the Cedar River in its natural flow through the Iowa River causes only a negligible effect upon the Mississippi River.

We call attention to this matter for the reason that this Court apparently establishes the jurisdiction of the Federal

Power Commission over this project and thus imposes the Federal Power Act upon the Cedar River by reason of this *ex parte* finding on the part of the Commission that the Cedar River is navigable.

It is fair to assume that when the original letter of February 7, 1940, was received by the Governor of Iowa advising of the filing of the original declaration of intention to build the original project which did not include the diversion of the water of the River, that the Governor did not deem that the proposal merited or required the wasting of any time in appearing in connection with it. The Executive Council of Iowa had twice denied the applicant a permit based upon that plan and the Governor knew that it was not a feasible or practicable plan, and had a right to assume that the Federal Power Commission would likewise so find as it did find in its decision of January 29, 1944, a part of which is set out on page 4 of the printed opinion of this Court. Therefore, on this record, the Governor of Iowa was not notified of the new project which included a major change, and in effect was a new and different declaration of intention to construct. The State of Iowa cannot be charged with negligence in failing to appear under these circumstances and especially since the finding of the Commission of June 3, 1941, included a finding that the new project would cause extreme fluctuations in the Mississippi River at Muscatine, the place of the outlet of the diversion canal.

In the briefs on the original submission both the applicant and Counsel for the Federal Power Commission assert that the "finding" of the Commission on June 3, 1941, is in effect an "order" and that the State having not appealed therefrom is now estopped to assert these matters. Such a position is not tenable. The declaration of intention to construct was filed under the provisions of Section 23(b) of the Federal Power Act. There is no provision in that Section

for any hearing or for the giving of notice. That Section merely provides that before any one desiring to construct a dam or other project in any stream, other than those defined as navigable and over which Congress has jurisdiction under its authority to regulate commerce among the several States, shall before such construction, file a declaration of intention with the Commission "whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, city or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and have received a license under the provisions of this Chapter". It provides that if the Commission shall not so find then permission is granted to construct the project upon compliance with the State laws.

In the case at bar the "finding" of June 3, 1941, was under the provisions of Section 23(b). There was no formal hearing. There was merely an investigation by the Commission. This was solely for the purpose of advising the applicant whether it would be required to file an application for a license under the provisions of Section 4(e) of the Act. To hold that this was an order and that the State is estopped because it did not appeal therefrom is a denial of due process of law. Subsequently on August 11, 1941, and after the June 3, 1941, "findings", the applicant did file its application under Section 4(e) of the Act. Notices presumably were sent out under the provisions of Section 4(f) of the Act, for the State and other parties did thereafter appear. The State questioned the navigability of the Cedar River before the Commission. Therefore, the State did not waive its right to challenge these findings.

Upon the hearing the State called the attention of the Federal Power Commission to the fact that Congress had

already determined that the outlet for the Cedar River through the Iowa River into the Mississippi River is a non-navigable stretch by Acts of Congress, and that therefore perforce the Cedar River could not be considered a navigable water of the United States under the commerce clause of the Federal Constitution.

Note in this connection that the Cedar River flows for about twenty-one miles below the site of the proposed diversion dam where it joins the Iowa River at the town of Columbus Junction, and that the Iowa River then flows for twenty-eight miles in the State of Iowa before it joins the Mississippi River at the eastern border of the State. At this point we desire to call the attention of the Court again as we did on page 40 of our brief on the original submission, to the point that Congress determined the fact and by enactments gave expression to the fact that the Iowa River from approximately its point of junction with the Mississippi River and for a distance of twenty miles from that junction and to a point above the town of Wapello located upon the Iowa River is not a navigable river or a public highway. We again set out those enactments for the information of the Court:

> "Acts of Congress of May 6, 1870. (Iowa River.) So much of the Iowa River within the State of Iowa, as lies north of the town of Wapello shall not be deemed a navigable river or public highway, but dams and bridges may be constructed across it." (Rev. Stat. 1878, Sec. 5278, U.S.C.A. Title 33, Sec. 31.)

> "Acts of Congress of Aug. 18, 1894. So much of the Iowa River within the State of Iowa as lies between the town of Toolsboro and the town of Wapello in the County of Louisa, shall not be deemed a navigable river or public highway, but dams and bridges may be constructed across it." (Chap. 299, 53rd Congress, 2nd Session, U.S.C.A. Title 33, Sec. 31.)

The Federal Power Commission therefore had no right nor power to make a finding of fact adverse and contrary to the finding of fact made by the creator of the Federal Power Commission and of the Federal Power Act, the Congress of the United States. If twenty miles of the Iowa River below the junction of the Cedar River with the Iowa River is non-navigable, (and it cannot be disputed that Congress has determined that fact), then how can there be any commerce from the Cedar River among the several States. The Cedar River lies wholly within the State of Iowa. If any parts of the river are navigable there can be commerce only between interior points within the State of Iowa and not among the States under the commerce clause of the Federal Constitution. This fundamental concept was first pronounced by the members of this Court early in the life of this Nation in the case of *Daniel Ball*, 10 Wall 557. There the Court stated:

> "Those rivers must be regarded as public navigable rivers in law which are navigable in fact, and they are navigable in fact when they are used, or are susceptible of being used in every ordinary condition as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water, and they constitute navigable water of the United States within the meaning of the Acts of Congress, in contra-distinction from the navigable waters of the States, when they form in every ordinary condition by themselves, *or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.*" (Emphasis ours.)

This situation is like unto one where there is an inland lake which is navigable but has no outlet and is wholly within a State. The Federal Government would not and could not under the commerce clause assume that such an inland lake is a navigable water of the United States. Neither is the situation in the Cedar River any different than the situation

above described as to the inland lake. The determination of the fact of non-navigability and the expression of it by the Acts of Congress is as effective as though that twenty mile stretch were a stretch of dry land. The Iowa River and the Cedar River both were thereby declared to be non-navigable. The situation is not like one where there are rapids or other similar obstructions in an otherwise navigable stream which could by reasonable cost and as a practicable proposition, be blasted out and a channel made through the rapids. No such a situation can exist in this case.

The administrative authorities of the United States having to do with the navigable waters of the United States have always considered that the Cedar River is not a navigable water of the United States. The Chief of Engineers of the United States Army, W. H. Bixby, in connection with an application made by the Federal Construction Company of Muscatine, for permission to build a dam across the Cedar River stated on August 26, 1911, as follows:

> "As the Cedar River terminates by a junction with the Iowa River well inside the State of Iowa and in the language of the Supreme Court does not by itself, or by uniting with other waters, form a continued highway over which commerce is or may be carried on with other States or foreign countries, it follows that the Cedar River is not a navigable water of the United States, as defined by the Supreme Court, but constitutes a navigable water of the State of Iowa."

The pronouncements in *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 85 L. Ed. 243, do not in any manner adversely affect the situation in the case at bar because neither the Power Commission or this Court has the right to say that the River is navigable contrary to the Acts of Congress, which declare that it is non-navigable.

Therefore, the State complains of the *ex parte* finding by the Federal Power Commission that the Cedar River is a

navigable water of the United States and submits that if this Court is founding its opinion upon that premise, that the premise is built upon the sands and cannot stand. We submit that inasmuch as the opinion of the Court calls attention in the opinion and in the footnotes to the fact that the State of Iowa did not appear in response to the letter of February 7, 1940, to its Governor, note should be taken of the fact that the Federal Power Commission had before it at the time it made its findings of June 3, 1911, a new and different application involving a materially different project. The Commission should have taken judicial notice just as the Chief Engineer of the Army did, that Congress had already by an Act of Congress declared the fact that the Cedar River is not a navigable water of the United States because it lies within the interior of the State of Iowa and there is no way to get out of the Cedar River into another State. A rehearing should be granted and this Court should consider these matters in determining whether or not the Federal Power Act is applicable at all to this project in view of the broad scope of the opinion.

See in this connection:

Veazie v. *Moore*, 14 How. (U.S.) 567, 14 L. Ed. 545;
Glenn v. *Philadelphia*, 3 Wall (U.S.) 721;
Moore v. *American Transportation Co.*, 24 How. (U. S.) 1, 39; 16 L. Ed. 674.
The Montello, 11 Wall (U.S.) 411, 415;
Gibbon v. *Ogden*, 9 Wheat 192, 6 L. Ed. 23.

II.

The Court's Opinion Rests on Erroneous Findings of Law.

This ground is divided into three subdivisions, namely, (1) that the Court erred in declaring that the provisions of the Iowa law as contained in Chapter 363 of the Code of Iowa, are not such state laws as are referred to in Section

9(b) of the Federal Power Act; (2) the opinion of the Court arbitrarily construes and defines the meaning of state laws before a construction thereof has been made by the Iowa Courts, which violates all precedents; and (3) the opinion ignores the mandate contained in Section 9(b) of the Federal Power Act which provides that the applicant *shall* submit satisfactory evidence of compliance with certain state laws.

1. The opinion of the Court erroneously states that the Iowa statutes in question are not such statutes as are referred to in Section 9(b) of the Federal Power Act. Section 9(b) provides as follows:

> "That each applicant for a license hereunder *shall* submit to the Commission—
>
> (b) *Satisfactory evidence* that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located *with respect* to bed and banks and *to the appropriation, diversion and use of water for power purposes* and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act." (Emphasis ours.)

Without repeating all of the Iowa law as contained in Chapter 363 of the Code of Iowa which is set out in Appendix A of the Brief of the Power Commission on original submission, we desire to call attention to the fact that said provisions of law are with respect to things other than the "property rights" of the petitioner and of other individuals. It is true that the Iowa law requires an application to the Executive Council and requires that certain information be furnished in order to apprise the Executive Council as to the nature of the proposed development so that the Executive Council can have information upon which to determine whether the proposed project is covered by the laws of the state with respect not only to bed and banks, but to the

appropriation, diversion and use of water for power purposes, and with respect to the right to engage in the business. The statute calls for information as to the nature of the project, where it is to be constructed, how, a map showing the lands to be affected, the ownership of the tracts and such additional information as the Council may require in order to determine under the police power of the state whether the project is a proper project, and whether it will be detrimental to the interests of the people of the state. Section 7771 of the Code of Iowa provides that—

> "If it shall appear to the Council that the construction, operation or maintenance of the dam will not materially obstruct existing navigation, or materially affect other public rights, will not endanger life or public health, and any water taken from the stream in connection with the project is returned thereto at the nearest practical place without being materially diminished in quantity or polluted or rendered deleterious to fish life, it shall grant the permit upon such terms and conditions as it may prescribe."

Obviously, these provisions enjoin upon the Council the duty to protect the interests of the state in regard to these matters. It is further provided that the Executive Council shall investigate the methods of construction, operation, maintenance and equipment of the dam so as to determine the best method to conserve and protect as far as possible all public and riparian rights in the waters of the state, and so as to protect the life, health and property of the general public. We cannot conceive of any language which would more nearly refer to the appropriation, diversion and use of water for power purposes than these provisions which have just been referred to. Surely, no one can contend that this language does not refer to the appropriation, diversion and use of water for power purposes. Obviously, these provisions of law are of the character referred to in Section 9(b) of the Act.

It will be noted that Section 9(b) does not say that the applicant may, or that the Commission in its discretion may require an applicant to submit satisfactory evidence of compliance with these state laws. Section 9(b) clearly says that each applicant *shall* submit to the Commission satisfactory evidence, etc. What is satisfactory evidence? The ordinary meaning of the word "satisfactory" in all accepted dictionaries is that the evidence shall be sufficient, shall be complete, shall completely embrace the field. There is no opportunity for construction of these plain words. They mean what they say. Leaving out the reference to "bed and banks" for the time being, Section 9(b) of the Act requires that before a license can be granted that each applicant shall submit satisfactory evidence of compliance with the laws of Iowa with respect to the appropriation, diversion and use of water for power purposes. There is nothing in that phraseology which limits the requirement to property rights of individuals or to property rights of the petitioner. The opinion of this Court is wrong in such assertions. The opinion in this case commencing at the bottom of page 5 of the printed report states that the Commission would have been justified in following its own interpretation of the Act and proceeding with the merits of the application without requiring the petitioner to submit evidence of its compliance with the terms of Chapter 363, or of any other laws of the State of Iowa, which the Commission might hold to be inapplicable or to have been superseded by the Federal Power Act. We submit that this is not a sound pronouncement of law. It is inconceivable that an agency of the government can elect to ignore the plain mandates of Congress. This Court cannot say to an agency of the Federal government that it has the right to override a state law upon a given subject and decide that it is inapplicable or has been superseded by a Federal Act. In *Davies Warehouse Company* v. *Bowles*, 321 U. S. 144, 88 L. Ed. 379, involving the admini-

tration of the Maximum Price Regulations, this Court, mindful of the present necessity to preserve a fundamental principle, refused to interfere with the application of a state statute in a matter which obviously would defeat the authority of the Price Administrator. You there had the following to say:

> "Nor should we rush the trend to centralization where Congress has not. It could never be more appropriate than now to heed the maxim reiterated recently by the Court that 'the extension of federal control into these traditional local domains is a delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions.' *Yonkers* v. *United States*, No. 109, October Term, 1943, decided January 3, 1944, (U. S. , *ante*, 241, 64 S. Ct. 327); *Palmer* v. *Massachusetts*, 308 U. S. 79, 84, 84 L. Ed. 93, 97, 60 S. Ct. 34, 41 Am. Bankr. Rep. (N.S.) 134. At least in the absence of a congressional mandate to that effect, we cannot adopt a rule of construction otherwise unjustified, to relieve federal administrators of what we may well believe is a substantial burden but one implied by the terms of the legislation when viewed against the background of our form of government."

This Court, in the *Bowles* case, further stated that it is a serious thing to adopt a rule of construction "which precludes the execution of state laws by state authority in a matter normally within state power." Your opinion says loosely that Section 9(b) does not mean that an applicant is required to secure a permit from the state as a condition precedent, and you say to so require would vest in the Executive Council of Iowa a veto power over the Federal project. This is an incorrect statement of the situation. True, the result of compliance with the state law would be the issuance of a state permit. The Iowa law does not arbitrarily say that before one can build anything, regardless of what it is, he must obtain a permit from the state just for the sake of obtaining a permit. The opinion of this Court deals with

the subject as though that were the case, and determines the situation based on the false premise as a contention on our part that Section 9(b) of the Act means that the "consent" of the state as an abstract proposition must be obtained.

On oral argument in answer to a question by Mr. Justice Black, we answered this very proposition and stated that reference to the Iowa permit included the compliance with these regulatory laws of the state with reference to the appropriation, diversion and use of water for power purposes, and that it is the compliance with these regulations in the law evidenced by the issuance of the permit which is important rather than the mere issuance of a permit on a piece of paper.

This Court, on page 8 of its printed opinion, states that Section 7771 of the Iowa law strikes at the heart of the present project. The opinion states that the feature of the project which supposedly commended it to the Federal Power Commission was its diversion of substantially all of the water of the Cedar River near Moscow to the Mississippi River near Muscatine, and that such diversion has long been recognized as an engineering possibility and as constituting the largest power development foreseeable on either the Cedar or Iowa Rivers. The opinion then states that it is this feature that brings this project squarely under the Federal Power Act. In other words, this Court says that for the strictly single purpose of creating a power project only, the mere proposal of the project gives the Commission jurisdiction and that, therefore, having obtained jurisdiction it should then proceed to destroy the river and to destroy any possible commerce among the states as it allegedly existed from or over this river. This is indeed an unusual pronouncement.

You have already said in *United States v. Appalachian Electric Power Company*, 311 U. S. 377, 426; 85 L. Ed. 243, 262, as follows:

"The United States cannot by calling a project of its own a 'multiple purpose dam' give to itself additional powers, but equally truly respondent cannot, by seeking to use a navigable waterway for power generation alone, avoid the authority of the Government over the stream. That authority is as broad as the needs of commerce. Water power development from dams in navigable streams is from the public's standpoint a by-product of the general use of the rivers for commerce."

The opinion of the Court undertakes to interpret Section 9(b) of the Federal Power Act by reference to its legislative history. The quotation from the statement by Representative William L. LaFollette of Washington set out on page 11 of the printed opinion of this Court is not applicable to the point for which it is cited. The discussion referred to was in regard to the debate which lead to the insertion into Section 9(b) of the three words "bed and banks". The Section as already submitted by the Committee provided that each applicant shall submit to the Commission "satisfactory evidence that the applicant has complied with the requirements of the laws of the state or states within which the proposed project is to be located with respect to the appropriation, diversion and use of water for power purposes". Mr. LaFollette moved to insert therein "bed and banks" so that the provision would read—"with respect to bed and banks and to the appropriation, diversion and use of water for power purposes". The Court on page 11 of its opinion refers only to the reasons for inserting "bed and banks". There is no question but that the title to the "bed and banks" below the meandered line or high water line is in the states for the benefit of the public. Mr. LaFollette wanted all rights as to bed and banks included in the requirements of Section 9(b) because if it were left out and the Power Commission did not require a showing as to "bed and banks", then the law might be vulnerable to attack. Mr. LaFollette was not referring in that statement to the other provisions

of the proposed law as they were prior to the insertion of the phrase "bed and banks". We desire to call attention to the following quotation from Mr. LaFollette's statement which the opinion overlooks:

> "If we make it one of the conditions precedent to the procuring of a license that the applicant has complied with the requirements of state law as to bed and banks, diversion, and use of water, we are most assuredly not infringing any state rights in that respect." Cong. Rec. Vol. 56, Part 9, p. 9108.

Further, in this connection, we desire to call the attention of the Court to what Representative Mondell said on the floor of the House in discussing Section 9(b) of the Act. Before Mr. LaFollette's amendment as to "bed and banks" was inserted, Mr. Mondell stated the following:

> "The provision is that the applicant shall have complied with the laws of the State with respect to the appropriation, diversion, or use of water; that is, he shall have complied with all of the laws of the state applicable to the situation up to the time he makes his application." Cong. Rec. Vol. 56, Part 10, Page 9812.

We call attention to Representative Mondell's further statement in explanation of Section 9(b) of the Act:

> "The provision is that the applicant shall comply with the State law. All that the gentleman from California wants him to do is to comply with the State law only so far as the making of the application is concerned. What benefit would it be to the commission that Jones, Smith, or Brown may have picked up a piece of paper and scribbled an application on it and put it in the mail, or perhaps filled out the proper application blank. That gets nowhere and accomplishes nothing. The law of the State is that he shall make his application with certain necessary data and that there shall be in response to that inquiry an investigation as to whether there is water available that can be used to turn a wheel without depriving some one else of a prior right and whether or not the conditions are such that under the State law

such water can be used at that point for power purposes. After the license applicant has completed his waterright application he comes before the commission with his own data verified and full information obtained from the State and permission from the State to proceed, and applies for his license from the Federal Government. But the gentleman from California would cut all this procedure off immediately on the application to the State being made or notice posted on the bank of a stream in a hazel-brush patch, where nobody would see it. There would be nothing on which the commission could act, no procedure had which would inform the commission on questions of vital importance." (Cong. Rec. Vol. 56, Part 10, p. 9814.)

Further, Representative Sinnott in explaining the conference report to the House of Representatives specifically pointed out that the states rights were protected in the Bill, citing Section 9(b) as one of the provisions which protected such rights. He stated as follows:

"Under this Bill we respect the rights of states. In fact, no rights can be granted under this Bill unless the applicant shows that he has complied with the laws of the individual states." (Cong. Rec. Vol. 59. Part 7, p. 6537.)

Again Mr. LaFollette, on another occasion, stated in regard to Section 9(b), as follows:

"Under the proposed law the would-be licensee is supposed to have procured all concessions and necessary powers of the State or States in which the proposed project is situated before a license can be issued, thus harmonizing State and Federal interest, making development possible without either transgressing the sovereign powers of the States or conferring on the Federal Government any plenary power not contemplated by the Constitution. Under this bill we only allow the commission a supervisory power over those functions entirely within the State's jurisdiction for the period covered by any license, the State having exercised its right in advance of issue." (Cong. Rec. Vol. 56, Part 9, p. 9108.)

Furthermore, this Court overlooks completely your pronouncements in *United States* v. *West Virginia*, 295 U. S. 463, 472, 79 L. Ed. 1546, 1552. This Court there said:

> "The bill seeks an injunction against the corporate defendants, restraining only the construction of the dam without a license from the Federal Power Commission. But *Section 9(b) of the Federal Water Power Act requires that every applicant for a license shall present 'satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power * * *'. The mere grant of the state license, which the Federal Water Power Act makes prerequisite to the application for the Federal license, cannot be said to involve any infringement of the federal authority.* It does not appear that the State has done more." (Italics supplied.)

This Court correctly states that Section 9(b) does not in and of itself require compliance with state laws. What it does do is say that the Commission cannot grant a license until the applicant has presented satisfactory evidence of compliance with the state laws described. Surely, the plain language of Section 9(b) cannot be interpreted to mean as stated on page 17 of the printed opinion that the evidence required is merely that which shall be satisfactory to the Commission. We submit that Section 9(b) states that if there are state laws relative to these subject matters the Commission on its own initiative is required to require proof by sufficient and satisfactory evidence that those provisions have been complied with. If there is a dispute as to what they mean, then it is not for the Commission to decide that meaning. It is for the Courts of the State to determine the meaning of its state laws as will be discussed in a subsequent division.

We therefore submit that the opinion of this Court arbitrarily makes a wrong interpretation of the Iowa statutes and of Section 9(b) of the Federal Power Act. We submit that a rehearing must be granted in order to correct this apparent error in the opinion of this Court.

2. The opinion of this Court undertakes to construe and define the meaning of the laws of Iowa before a construction thereof has been made by the Courts of the State of Iowa. This assumption on the part of this Court violates all precedents. The opinion of this Court states on page 12 thereof that the Executive Council which includes the Governor, on July 5, 1944, adopted a resolution directing the Attorney General to intervene in this case before the Court of Appeals and there take steps to sustain the order of the Federal Power Commission because "it is vital to the interests of the State of Iowa that the said order of the Commission be sustained". You then assume and state that this demonstrates that the State of Iowa is not only opposed to the granting of a State permit but is opposed also to the granting of a Federal license for the present project. You also state that this position is based in part on the ground that the State statute as interpreted by the Attorney General in its Petition of Intervention, expresses a policy opposed to the diversion of water from one stream to another in Iowa under such circumstances as the present. You then in effect state that because of this attitude by the officials of Iowa, you are justified in making a construction of the Iowa law although no Iowa Court has yet been called upon to construe it. The opinion gives the State and its laws no consideration whatsoever under its reserve powers under the Tenth Amendment to the Constitution, nor under the plain mandates of the Federal Power Act protecting and reserving to the States the right to protect itself against abuses. The opinion in

effect is an argument for the private project and against the State.

Surely this Court does not intend to say that under the guise of regulating commerce among the States upon the waters of the State, the Federal Government can authorize private individuals to take over the interior waters of the State and use them for private purposes without reckoning with the State laws. By thus interpreting the laws of the State the opinion does violence to all of the precedents upon the subject matter. It is not the province of this Court or of any other Federal Court to determine the meaning of a State law and to decide what the State law means such as is done by the opinion in this case. As stated in the dissent by Mr. Justice Frankfurter, the question of whether the Commission has such satisfactory evidence as is referred to in Section 9(b), depends upon what the requirements of the State laws are. As stated by Mr. Justice Frankfurter "Time out of mind and in a variety of situations, this Court has admonished against the avoidable assumption by this Court of the independent construction of State legislation". Citing *Gilchrist* v. *Interborough Co.*, 279 U. S. 159, 207, 209.

The Power Commission in its brief in this Court recognizes that the Iowa laws on their face are laws with respect to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting and distributing power within the meaning of Section 9(b) of the Act. Counsel for the Power Commission on page 19 of its brief, refer to the legislative history of the Act and agree that the legislative history bears out the contention of the State in this matter. The Federal Power Commission in disposing of this case properly stated that the appropriate place for the determination of the validity of the State law is in the Courts. The Court of Appeals said it is for the State Court to construe State statutes. On application by the petitioner for a State

permit, the Executive Council of Iowa may decide to grant the application or deny it on a ground wholly unrelated to the Federal Power Act and which would be valid. It is not for this Court to decide that the Executive Council would do other than its duty when afforded an opportunity to pass upon the question under the law. As you have stated in your fact statements in the opinion, the Executive Council has never been afforded an opportunity to consider or pass upon the current project. As stated in *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, 423, "To predetermine even in the limited field of water power, the rights of different sovereignties pregnant with future controversies is beyond the judicial function".

We submit that the dissent states the correct principle of law, namely, that this Court should not undertake to construe the statutes of Iowa under the circumstances of this case and that the Federal Power Commission did not err in refusing to construe the Iowa statutes. Note in this case that the private applicant for a license from the Federal Power Commission ignored completely the State of Iowa and the laws of the State of Iowa and made no attempt to comply therewith in any respect.

3. The opinion of this Court ignores the mandate contained in Section 9(b) of the Federal Power Act which provides that each applicant shall submit to the Commission satisfactory evidence that the applicant has complied with the requirements of the laws of the State referred to therein. This Court in its opinion has taken such a broad view and has made such sweeping and comprehensive interpretations of the provisions of the Federal Power Act, that the Intervenor feels it should call the Court's specific attention again to Section 9(b) and to its meaning. If the opinion of this Court is to stand, it in effect renders the provisions of Section 9(b) of the Federal Power Act ineffective and worthless.

There can be no question but that all of the legislative history referred to in our brief on the original submission show clearly that Section 9(b) requires a full showing that the State laws relative to the use, diversion and appropriation of the water in the rivers of the State had been complied with. In this case none of the State laws have been complied with. This Court refers the case back to the Commission and says that the Commission will not act as a substitute for local authorities having jurisdiction over such questions as the sufficiency of the legal title of the applicant to its riparian rights or to the validity of its local franchises if any, relating to proposed intra-state public utility service. The opinion states that Section 9(b) says that the Commission may *wish* to have satisfactory evidence of progress made by the applicant toward meeting local requirements, but that it does not say that the Commission is to assume responsibility for the legal sufficiency of the steps taken. Section 9(b) does not say that the Commission may *wish* to have satisfactory evidence. It says the applicant *shall submit* satisfactory evidence that it *has complied* with the requirements of the State laws described.

If on remand, as stated in the opinion, the Commission is not to be permitted to pass upon the validity of state franchises, and water rights, then the case is right back where we now are, because we insist that this same situation now exists. In other words, neither the Commission nor this Court can substitute itself for the Executive Council of Iowa, and determine for the Council whether applicant has sufficiently complied with the Iowa laws leading to a franchise-permit. Section 9(b) says applicant *shall* present satisfactory evidence of compliance with such state laws.

The opinion rightly states that the Commission cannot substitute itself for the local authorities as to the validity of local franchises. The Iowa law here in question, if sat-

isfactorily complied with, results in the granting of a franchise from the State in the form of a permit. Simply because the law calls it a permit does not prevent the permit from also being a franchise. Furthermore, while it has not heretofore been mentioned because it was never considered necessary in view of the plain language of the law and of the prior administrative history of Section 9(b) by the Commission, there is a further provision of the Iowa law which is specifically referred to in Section 9(b) which has not been complied with. Note that Section 9(b) of the Act provides that the applicant shall submit satisfactory evidence of compliance with the requirements of the law of the States with respect "to the right to engage in the business of developing, transmitting and distributing power, and in any other business necessary to effect the purposes of a license under this Act". Chapter 363 of the Code of Iowa contains many provisions which pertain to these subjects. Further, there are other provisions of Iowa law not heretofore mentioned which require a franchise. Chapter 383 of the Code of Iowa (and the complete Code was introduced into evidence before the Power Commission) provides in Section 8309 thereof that:

> "No individual, company or corporation shall erect, maintain, or operate any transmission line, wire, or cable along, over, or across any public highway or ground and outside of cities and towns for the transmission, distribution, or sale of electric current, without first procuring from the Iowa State Commerce Commission or from the Board of Supervisors in the County of each of the respective Counties in which such transmission line is to be constructed or operated, a franchise granting authority to do so as in this Chapter provided."

The subsequent provisions of the Chapter set out requirements as to the petition and the notice for hearing, objections, form of the franchise, and other regulatory matters, supervision of construction, location, manner of con-

struction, and many other provisions none of which have been complied with by the applicant. Suppose the applicant does build its project, how is it going to run its transmission wires and lines in the State of Iowa and use the public lands of the State without a franchise as required by Chapter 383 of the Code of Iowa? It should first secure this franchise and then go to the Power Commission and prove its franchise by satisfactory evidence as required by Section 9(b) of the Act.

The above matters are among the many reasons why the opinion of this Court is wrong and why a rehearing should be granted so that the matter can again be presented and reviewed by this Court in the public interest.

III.

Federal Power Act Does Not Authorize Destruction of Rivers for Private Purposes.

It is further submitted that the opinion of this Court is clearly erroneous in holding that the Federal Power Commission under the Federal Power Act has jurisdiction under the guise of navigability of the Cedar River, and then has the authority and the power to destroy not only navigability, but also commerce among the States by a destruction of a large stretch of the River. There could never again be any navigation along the Cedar River and into the Iowa River (assuming that the Rivers were navigable), because of the destruction of the lower twenty-one miles of the Cedar River by this project. There is no way that navigation could be carried on through this narrow canal and over a one hundred foot drop along the canal which the project contemplates. Even though it were possible to construct locks, which it is not, it would take all the water in the Cedar River to operate the locks, and there would be none left for the power project.

This Court should take particular notice of the fact that this is not the Federal Government which is seeking to build

this project in the Cedar River for a governmental purpose. It is a private concern seeking to take the public waters of the State and to divert, use, and appropriate them completely for a private commercial purpose. Surely it was never the intention of Congress that such a thing should be done. As stated by this Court in the *Appalachian* case, *supra*:

> "The flow of a navigable stream is in no sense private property; 'that the running water in a great navigable stream is capable of private ownership is inconceivable'." (311 U. S. 377, 424.)

The opinion argues as though this private applicant is virtually a part of the Federal Government and that the State should not have anything to say about the project, even though the State may be irreparably damaged by it.

The Ninth Circuit Court in *United States* v. *Central Stockholders Corporation of Vallejo*, 52 F. (2d) 322 stated our contention as follows:

> "The Supreme Court held in the *Ford* case (*Ford & Son* v. *Little Falls Co.*, 280 U. S. 369, 50 S. Ct. 140, 75 L. Ed. 483), in effect, that it was not the intention of Congress to vest any portion of its sovereign power in the permittee, and, assuming that the government might have exercised its control over navigable streams by and through a permittee under the Federal Water Power Act, that it was not the intention of the Government so to do."

The present case involved just such an issue. This Court should follow the logic of the Ninth Circuit Court in this respect. If the opinion in this case is to stand as written, a private party could divert the Des Moines River in the center of Iowa and turn all of its water through a canal eastward to the Mississippi River and thus destroy the rest of the Des Moines River, if the Power Commission should grant a license. The State would be helpless to stop it, under this decision. Furthermore, as stated by the Court of Ap-

peals in its opinion, such a construction of the Federal Power Act would create a situation where the Federal Power Commission could grant a license, if so minded, to a private party to flood the State Capitol for a private purpose. Such a construction and view of the Federal Power Act we submit is intolerable. If such a diversion can be accomplished under the law in spite of the objection of the State, for eight or ten miles, it can be done for a hundred miles. Surely no such intention on the part of Congress can be gleaned from the language of the Federal Power Act. If for no other reason than this, a rehearing should be granted and the matter reconsidered and the opinion of this Court rewritten.

IV.

Applicant Has Not Complied With Either the Law or the Regulations of the Commission.

The opinion errs in not affirming the position of the Court of Appeals for the District of Columbia and the decision of the Federal Power Commission, because the record of the proceedings before the Power Commission and as certified to this Court and as recited in the opinion of this Court, shows clearly that the applicant has not complied with either the applicable provisions of law nor the rules and regulations promulgated by the Federal Power Commission. We adopt what we have said heretofore about the requirements of Section 9(b) of the Federal Power Act and the requirement that satisfactory evidence be adduced by the applicant herein of compliance with the laws of Iowa referred to. We desire also to call the attention of the Court to a further matter in the opinion which is inconsistent with the opinion.

The applicant herein not only has failed to comply with Section 9(b) of the Act, but has failed to comply with the Rules and Regulations of the Commission promulgated by the

Commission and applicable to this situation. Pursuant to its authority, the Commission adopted rules and regulations as contained in Section 4.41, and in Exhibit "D" and Exhibit "E" thereof. These provisions of the Regulations are set out in the footnote on page 11 of the printed opinion of this Court. Exhibits "D" and "E" of Regulation 4.41 specifically provide that:

> Sec. 4.41. "There shall be filed with the application for license and as a part thereof, the following Exhibits certified in conformity with Section 200.4: * * *
>
> Exhibit 'D'. Evidence that the applicant has complied with the requirements of the laws of the State or States within which the project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business, necessary to effect the purposes of the license applied for, including a certificate of convenience and necessity, if required. *This evidence shall be accompanied by a statement of the steps that have been taken and the steps that remain to be taken to acquire franchise or other rights from States*, counties, and municipalities before the project can be completed and put into operation.
>
> Exhibit 'E'. The nature, extent, and ownership of water rights which the applicant proposes to use in the development of the project covered by application, *together with satisfactory evidence that the applicant has proceeded as far as practicable in perfecting its rights to use sufficient water for proper operation of the project works. A certificate from the proper State agency setting forth the extent and validity of the applicant's water rights shall be appended if practicable.* In case the approval or permission of one or more States agencies is required by State law as a condition precedent to the applicant's right to take or use water for the operation of the project works, duly certified evidence of such approval or permission, or a showing of cause why such evidence cannot be reasonably submitted shall also

be filed. *When a State certificate is involved, one certified copy and three uncertified copies shall be submitted.*" (Emphasis ours.)

It will be observed that Regulation Exhibit "D" requires that the evidence shall be accompanied by a statement of the steps remaining to be taken to acquire a franchise or other rights from States before the project can be completed and put into operation. Also it will be observed in Exhibit "E" that it is required that the applicant present satisfactory evidence that it has proceeded as far as practicable in effecting its right to use sufficient water for proper operation of the project works. That can mean but one thing,—that it has secured a franchise or permit from the State of Iowa in the case at bar. The laws of the State of Iowa require such information as will determine that very thing. The Executive Council has a right to pass upon the project in the light of other uses which the State might desire to make of the water. Admittedly the applicant herein has not complied with this Regulation of the Commission. The opinion overlooks this fact and in view of the fact statement set out in the opinion, this Court should give consideration to this phase of the case. We submit that when proper consideration is given to it, that this Court can do nothing else under the facts than affirm the action of the Power Commission and the decision of the Court of Appeals for the District of Columbia.

CONCLUSION.

The pronouncements in the opinion of the Court in this case are of very vital and grave importance to all of the people of the United States. While we recognize that the Federal Government has complete plenary power over navigable streams of the United States as defined and included under the commerce clause of the Federal Constitution, yet we submit that a fiction can not be set up by an agency of

the Federal Government to assume jurisdiction, where none exists in fact or in law.

We have argued under the first proposition of this petition that the Cedar River is non-navigable and that therefore the Federal Power Act should not attach. We sincerely believe that it is non-navigable. In submitting the other propositions we make our presentation upon the assumption for the purposes of the presentations, that the Cedar River is a navigable water of the United States under the commerce clause. In either case we submit that the State of Iowa, the intervenor herein, is entitled to a rehearing for all of the reasons stated.

We submit that when this case is resubmitted and argued further, that this Court should withdraw the opinion herein and file an opinion affirming the decision of the Power Commission and the opinion of the Court of Appeals for the District of Columbia in this matter.

Respectfully submitted,

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CERTIFICATE.

The undersigned counsel for the Petitioner for a Rehearing certify that this petition is filed in good faith and not for the purpose of delay.

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pp. 21, 22, 24, 10, 1;

SUPREME COURT OF THE UNITED STATES.

No. 603.—October Term, 1945.

First Iowa Hydro-Electric Cooperative, Petitioner, *vs.* Federal Power Commission. State of Iowa, Intervenor.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[April 29, 1946.]

Mr. Justice Burton delivered the opinion of the Court.

This case illustrates the integration of federal and state jurisdictions in licensing water power projects under the Federal Power Act.[1] The petitioner is the First Iowa Hydro-Electric Cooperative, a cooperative association organized under the laws of Iowa with power to generate, distribute and sell electric energy. On June 29, 1940, pursuant to § 23(b)[2] of the Federal Power Act, it filed with the Federal Power Commission a declaration of intention to construct and operate a dam, reservoir and hydro-electric power plant on the Cedar River, near Moscow, Iowa.[3]

January

[1] 41 Stat. 1063, as amended, 49 Stat. 838, 16 U. S. C. §§ 791a-825r.

[2] "Sec. 23. . . . (b) It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands . . . of the United States . . . except under and in accordance with the terms of . . . a license granted pursuant to this Act. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands . . . are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws." 49 Stat. 846, 16 U. S. C. § 817.

[3] This described a project including an 8,500 foot earthen dam, and a power plant of three 5,000 kw. hydraulic turbine generators operating under a

On April 2, 1941, it also filed with the Commission an application for a license, under the Federal Power Act, to construct an enlarged project essentially like the one it now wishes to build. The cost of the enlarged project is estimated at $14,600,000. It calls for an 8,300 foot earthen dam on the Cedar River near Moscow, an 11,000 acre reservoir at that point and an eight mile diversion canal to a power plant to be built near Muscatine on the Mississippi. The canal will create two other reservoirs totaling 2,000 acres. It is alleged that the three reservoirs incidentally will provide needed recreational facilities. The power plant will have four turbo-generating units with a total capacity of 50,000 kw., operating with an average head of 101 feet of water provided by the fall from the canal to the Mississippi. Water will be pumped from the Mississippi up to the head bays of the power intake dam at the plant to meet possible shortages in supply. The tailrace will extend for a mile along the shore of the Mississippi to a point below Dam 16 on that River. Transmission lines will connect the project with a source of steam standby electric current at Davenport, Iowa, 24 miles up the Mississippi. The plant is expected to produce 200,000,000 kwh. of marketable power per year, of which 151,000,000 kwh. will be firm energy in an average year. Interchange of energy is proposed with the Moline-Rock Island Manufacturing Company near Davenport and the project is suggested as an alternative to the addition of a 50,000 kw. unit to the plant of that company. The power will be available especially to non-profit rural electrification cooperative associations and to cities and towns in 35 or more nearby counties.

The Cedar River rises in Minnesota and flows 270 miles southeasterly through Iowa to Moscow which is 10 miles west of the Mississippi. From there it flows southwesterly 29 miles to Columbus Junction where it joins the Iowa River and returns southeasterly 28 miles to the Mississippi. The proposed diversion will take all but about 25 c.f.s. of water from the Cedar River at Moscow. This will correspondingly reduce the flow in the Iowa River while the diverted water will enter the Mississippi at Muscatine about 20 miles above its present point of entry at the mouth of the Iowa River. There are no cities or towns on the Cedar River between Moscow and Columbus Junction and the record indicates

maximum head of 35 feet, with an estimated output of 47,000,000 kwh. per year. The water was to be returned to the Cedar River immediately below the dam.

that the petitioner has options upon 98% of the riparian rights on the Cedar River in that area. At petitioner's request, this application was treated as a supplement to its then pending declaration of intention to construct the smaller project.

On June 3, 1941, the Commission made the following findings:

"(1) That the Cedar and Iowa Rivers are navigable waters of the United States;

(2) That the diversion of water from the Cedar River by means of the diversion canal as set forth above would have a direct and substantial effect upon the flow and stage of the Iowa River and hence would affect the navigable capacity of that river;

(3) That the alternate withholding of water in the reservoir and canal during periods of shut-down of the power plant and the release of water at substantial rates of flow during periods of operation of the power plant, as set forth above, would cause extreme fluctuations in the flow of the Mississippi River at Muscatine, Iowa, and would substantially affect the navigable capacity of that river;

(4) That the interests of interstate commerce would be affected by construction of the project as described in the declaration of intention as supplemented;

(5) That the two small islands . . . [in the Cedar River] are public lands of the United States and will be partly or wholly flooded by the reservoir of the proposed project and will be occupied by the project;

(6) That a license for the construction proposed above is required under the provisions of the Federal Power Act." 2 Fed. Power Comm. Rep., 958.[4]

On August 11, 1941, the petitioner, pursuant to that finding, filed with the Commission an application for a license to construct the project above described. On November 4, 1941, the Commis-

[4] On February 7, 1940, the Commission had sent notice to the Governor of Iowa of the filing of the original declaration of intention and invited him to present information and comments relative thereto. The State, however, took no part in the proceedings. The record also indicates that twice in the three years before the present proceeding, the Executive Council of the State of Iowa rejected applications of the petitioner requesting state permits to construct a dam near Moscow comparable to that proposed in all of these proceedings, but not including a diversion of water from the Cedar to the Mississippi River. The last application of the petitioner to the Council for such a permit was filed August 12, 1940, and rejected June 25, 1941. No application has been made by the petitioner to the Executive Council for a state permit for construction of the project including the canal diverting most of the flow of the Cedar River to the Mississippi and providing for a plant and tailrace on the bank of the Mississippi. In its petition to intervene in the present proceeding for a federal license, the State alleged that such a diversion would violate § 7771 (in Chapter 363) of the Code of Iowa, 1939. That allegation touches the principal question in this case.

sion granted the State of Iowa's petition to intervene and, since then, the State has opposed actively the granting of the federal license.

On January 29, 1944, after extended hearings, the Commission rendered an opinion including the following statements:

> "As first presented, the plans of the applicant for developing the water resources of the Cedar river were neither desirable nor adequate, but many important changes in design have been made. [The opinion here quoted in a footnote § 10(a) of the Federal Power Act.][5] The applicant has also agreed to certain modifications proposed by the Chief of Engineers of the War Department. The present plans call for a practical and reasonably adequate development to utilize the head and water available, create a large storage reservoir, and make available for recreational purposes a considerable area now unsuitable for such use, all at a cost which does not appear to be unreasonable.
>
> "Further changes in design may be desirable, but they are minor in character and can be effected if the applicant is able to meet the other requirements of the act." *Re First Iowa Hydro-Electric Cooperative*, 52 PUR (NS) 82, 84.

We believe that the Commission would have been justified in proceeding further at that time with its consideration of the petitioner's application upon all the material facts. Such consideration would have included evidence submitted by the petitioner pursuant to § 9(b)[6] of the Federal Power Act as to the petitioner's compliance with the requirements of the laws of Iowa with respect to the petitioner's property rights to make its proposed use of the

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[5] "Sec. 10. All licenses issued under this Part shall be on the following conditions:

"(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval." 49 Stat. 842, 16 U. S. C. § 803(a).

[6] "Sec. 9. That each applicant for a license hereunder shall submit to the commission—

. . . . . .

"(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act." 41 Stat. 1068, 16 U. S. C. § 802(b).

affected river beds and banks and to divert and use river water for the proposed power purposes, as well as the petitioner's right, within the State of Iowa, to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of the license. The Commission, however, was confronted at that point with a claim by the State of Iowa that the petitioner must not only meet the requirements for a federal license for the project under the Federal Power Act, but should also present satisfactory evidence of its compliance with the requirements of Chapter 363 of the Code of Iowa, 1939, hereinafter discussed, for a permit from the State Executive Council of Iowa for the same project.

While it now appears, from its brief and the argument in this Court, that it is the opinion of the Federal Power Commission that the requirements of Chapter 363 of the Code of Iowa as to this project have been superseded by those of the Federal Power Act, yet, at the time of the original hearing, the Commission felt that the courts were the appropriate place for the decision on Iowa's contention as to the applicability and effectiveness of Chapter 363 of its Code in relation to this project. The Commission decided, therefore, to proceed no further until that question had been decided by the courts, and dismissed the petitioner's application, without prejudice, in accordance with the following explanation stated in its opinion:

> "The appropriate place for a determination of the validity of such state laws is in the courts and, if we dismiss the application for license on the basis of failure to comply with the requirements of § 9(b), applicant may seek review of our action and its contentions under § 313(b) of the Federal Power Act." 52 PUR (NS) 82, 85.

The Commission also expressly found that—

> "The applicant has not presented satisfactory evidence, pursuant to § 9(b) of the Federal Power Act, of compliance with the requirements of applicable laws of the state of Iowa requiring a permit from the State Executive Council to effect the purposes of a license under the Federal Power Act, and the pending application, as supplemented, should be dismissed without prejudice;" *id.* at 85.

This action, after all, did not save the Commission from passing on the issue, for the order of dismissal was a ruling upon it, adverse both to the petitioner's contentions and to its own views on the law. The Commission would have been justified in follow-

ing its own interpretation of the Federal Power Act and proceeding with the merits of the application without requiring the petitioner to submit evidence of its compliance with the terms of Chapter 363, or of any other laws of the State of Iowa, which the Commission held to be inapplicable or to have been superseded by the Federal Power Act.

On the applicant's petition for review of the dismissal, it was affirmed by the United States Court of Appeals for the District of Columbia. 151 F. 2d 20. We then granted certiorari under § 240(a) of the Judicial Code, 28 U. S. C. § 347, and § 313(b) of the Federal Power Act, 49 Stat. 860, 16 U. S. S. § 825*l*, because of the importance of the case in applying the Federal Power Act.

The findings made by the Commission on June 3, 1941, in response to the petitioner's declaration of intention are not in question. For the purposes of this application it is settled that the project will affect the navigability of the Cedar, Iowa and Mississippi Rivers, each of which has been determined to be a part of the navigable waters of the United States; will affect the interests of interstate commerce; will flood certain public lands of the United States; and will require for its construction a license from the Commission.[7] The project is clearly within the jurisdiction of the Commission under the Federal Power Act. The question at issue is the need, if any, for the presentation of satisfactory evidence of the petitioner's compliance with the terms of Chapter 363 of the Code of Iowa. This question is put in issue by the petition for review of the order of the Commission which dis-

[7] "Sec. 4. The Commission is hereby authorized and empowered—

. . . . . .

"(e) To issue licenses . . . to any corporation organized under the laws of the United States or any State thereof, . . . for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands . . . of the United States . . . : *Provided further*, That no license affecting navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting navigation have been approved by the Chief of Engineers and the Secretary of War. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: . . . ." 49 Stat. 840, 16 U. S. C. § 797(e). See also, § 23(b), note 2, *supra*.

missed the application solely on the ground of the failure of the petitioner to present such evidence. The laws of Iowa which that State contends are applicable and require a permit from its Executive Council to effect the purposes of the federal license are all in §§ 7767-7796.1 of the Code of Iowa, 1939, constituting Chapter 363, entitled "Mill Dams and Races." Section 7767 of that chapter is alleged to require the issuance of a permit by the Executive Council of the State, and is the one on which the Commission's order must depend. It provides:

> "7767 Prohibition—permit. No dam shall be constructed, maintained, or operated in this state in any navigable or meandered stream for any purpose, or in any other stream for manufacturing or power purposes, nor shall any water be taken from such streams for industrial purposes, unless a permit has been granted by the executive council to the person, firm, corporation, or municipality constructing, maintaining, or operating the same."[8]

To require the petitioner to secure the actual grant to it of a State permit under § 7767 as a condition precedent to securing a federal license for the same project under the Federal Power Act would vest in the Executive Council of Iowa a veto power over the federal project. Such a veto power easily could destroy the effectiveness of the federal act. It would subordinate to the control of the State the "comprehensive" planning which the Act provides shall depend upon the judgment of the Federal Power Commission or other representatives of the Federal Government.[9]

The Commission's order of dismissal avoids this extreme result because, instead of charging the petitioner with failure to present satisfactory evidence of the actual grant to it of a State permit, the order charges the petitioner with failure to present satisfactory evidence merely of its "compliance with the requirements of applicable laws of the State of Iowa requiring a permit from the State Executive Council." While this avoids subjecting the petitioner to an arbitrary and capricious refusal of the permit it does not meet the substance of the objection to the order. For example, § 7776 of the State Code requires that "the method of construction, operation, maintenance, and equipment of any and all dams in such waters shall be subject to the approval of the executive council." This would subject to State control the very requirements of the project that Congress has placed in the discretion

[8] Sections 7771, 7776, 7792 and 7796 of Chapter 363 have a less direct relation to the issue but would be superseded by the Federal Power Act if § 7767 is superseded by it.

[9] See § 10(a), note 5, *supra;* § 23(b), note 2, *supra;* and § 4(e), note 7, *supra.*

of the Federal Power Commission.[10] A still greater difficulty is illustrated by § 7771. This states the requirements for a State permit as follows:

> "7771 When permit granted. If it shall appear to the council that the construction, operation, or maintenance of the dam will not materially obstruct existing navigation, or materially affect other public rights, will not endanger life or public health, and *any water taken from the stream in connection with the project is returned thereto at the nearest practicable place* without being materially diminished in quantity or polluted or rendered deleterious to fish life, it shall grant the permit, upon such terms and conditions as it may prescribe." (Italics supplied.)

This strikes at the heart of the present project. The feature of the project which especially commended it to the Federal Power Commission was its diversion of substantially all of the waters of the Cedar River near Moscow, to the Mississippi River near Muscatine. Such a diversion long has been recognized as an engineering possibility and as constituting the largest power development forseeable on either the Cedar or Iowa Rivers.[11] It is this diversion that makes possible the increase in the head of water for power development from a maximum of 35 feet to an average of 101 feet, the increase in the capacity of the plant from 15,000 kw. to 50,000 kw. and its output from 47,000,000 kwh. to 200,000,000 kwh. per year. It is this diversion that led the Federal Power Commission, on January 29, 1944, to make its favorable appraisal of the enlarged project in contrast to its unfavorable appraisal.

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[10] See § 10(a), note 5, *supra;* and also:

"Sec. 10. All licenses issued under this Part shall be on the following conditions: . . .

"(b) That except when emergency shall require for the protection of navigation, life, health, or property, no substantial alteration or addition not in conformity with the approved plans shall be made to any dam or other project works constructed hereunder . . . without the prior *approval of the Commission*; and any emergency alteration or addition so made shall thereafter be subject to such modification and change *as the Commission may direct.*

"(c) That the licensee shall maintain the project works in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the development and transmission of power, shall make all necessary renewals and replacements, shall establish and maintain adequate depreciation reserves for such purposes, shall so maintain and operate said works as not to impair navigation, and shall conform to such rules and regulations as *the Commission may from time to time prescribe* for the protection of life, health, and property. . . . . " 49 Stat. 842, 16 U. S. C. § 803(b) and (c). (Italics supplied.)

[11] Report from the Chief of Engineers on the Iowa River and its tributaries made in 1929 covering navigation, flood control, power development and irrigation. H. R. Doc. No. 134, 71st Cong., 2d Sess., 86, 87, 90.

and to the State's rejection, of the smaller project. It is this feature that brings this project squarely under the Federal Power Act and at the same time gives the project its greatest economic justification.

If a State permit is not required, there is no justification for requiring the petitioner, as a condition of securing its federal permit, to present evidence of the petitioner's compliance with the requirements of the State Code for a State permit. Compliance with State requirements that are in conflict with federal requirements may well block the federal license. For example, compliance with the State requirement, discussed above, that the water of the Cedar River all be returned to it at the nearest practicable place would reduce the project to the small one which is classified by the Federal Power Commission as "neither desirable nor adequate." Similarly, compliance with the engineering requirements of the State Executive Council, if additional to or different from the federal requirements, may well result in duplications of expenditures that would handicap the financial success of the project. Compliance with requirements for a permit that is not to be issued is a procedure so futile that it cannot be imputed to Congress in the absence of an express provision for it. On the other hand, there is ample opportunity for the Federal Power Commission, under the authority expressly given to it by Congress, to require by regulation the presentation of evidence satisfactory to it of the petitioner's compliance with any of the requirements for a State permit on the state waters of Iowa that the Commission considers appropriate to effect the purposes of a federal license on the navigable waters of the United States. This evidence can be required of the petitioner upon the remanding of this application to the Commission.

In the Federal Power Act there is a separation of those subjects which remain under the jurisdiction of the states from those subjects which the Constitution delegates to the United States and over which Congress vests the Federal Power Commission with authority to act. To the extent of this separation, the Act establishes a dual system of control. The duality of control consists merely of the division of the common enterprise between two cooperating agencies of Government, each with final authority in its own jurisdiction. The duality does not require two agencies to share in the final decision of the same issue. Where the Federal Government supersedes the state government there is no suggestion that the

two agencies both shall have final authority. In fact a contrary policy is indicated in §§ 4(e), 10(a)(b) and (c), and 23(b).[12] In those sections the Act places the responsibility squarely upon federal officials and usually upon the Federal Power Commission. A dual final authority, with a duplicate system of state permits and federal licenses required for each project, would be unworkable. "Compliance with the requirements" of such a duplicated system of licensing would be nearly as bad. Conformity to both standards would be impossible in some cases and probably difficult in most of them.[13] The solution adopted by Congress, as to what evidence an applicant for a federal license should submit to the Federal Power Commission, appears in § 9 of its Act. It contains not only subsection (b)[14] but also subsections (a) and (c).[15] Section 9(c) permits the Commission to secure from the applicant "Such additional information as the commission may require." This enables it to secure, *in so far as it deems it material*, such parts or all of the information that the respective states may have prescribed in state statutes as a basis for state action. The entire administrative procedure required as to the present application for a license is described in § 9 and in the Rules of Practice and Regulations of the Commission.[16]

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[12] See notes 7, 5, 10 and 2, *supra*.

[13] In addition to those given in the text, another example of conflict between the project requirements of the Iowa statutes and those of the Federal Power Act appears in § 7792 of the Iowa Code. That section requires the beginning of construction of the project dam or raceway within one year and the completion of the plant within three years after the granting of the permit. This conflicts with § 13 of the Federal Power Act which makes this largely discretionary with the Federal Power Commission but generally contemplates that the construction be commenced within two years from the date of the license. So in § 7793 of the Iowa Code, the life of a permit conflicts with the term of a license under § 6 of the Federal Power Act.

[14] See note 6, *supra*.

[15] "Sec. 9. That each applicant for a license hereunder shall submit to the commission—

"(a) Such maps, plans, specifications, and estimates of cost as may be required for a full understanding of the proposed project. Such maps, plans, and specifications when approved by the commission shall be made a part of the license; and thereafter no change shall be made in said maps, plans, or specifications until such changes shall have been approved and made a part of such license by the commission.

. . . . . .

"(c) Such additional information as the commission may require." 41 Stat. 1068, 16 U. S. C. § 802(a) and (c).

[16] These rules and regulations are issued pursuant to §§ 308, 308 and 309, 49 Stat. 858, 16 U. S. C. §§ 825(b), 825g and 825h, interpreting §§ 4 and 9 of the Federal Power Act. Federal Power Commission Rules of Practice and Regulations, 1938, §§ 4.40-4.51, 18 C. F. R. §§ 4.40-4.51. They cover the field so fully as to leave no purpose to be served by filing comparable informa-

The securing of an Iowa state permit is not in any sense a condition precedent or an administrative procedure that must be exhausted before securing a federal license. It is a procedure required by the State of Iowa in dealing with its local streams and also with the waters of the United States within that State in the absence of an assumption of jurisdiction by the United States over the navigability of its waters. Now that the Federal Government has taken jurisdiction of such waters under the Federal Power Act, it has not by statute or regulation added the state requirements to its federal requirements.

The State of Iowa, in its petition to intervene in the proceedings before the Commission stated in relation to the proposed diversion of water from the Cedar River to the Mississippi: "said diversion would be in direct violation of the provisions of section 7771, Code of Iowa 1939." Also, in the State's motion to intervene in the proceedings before the Court of Appeals, it alleged that "By reason of said provisions of law [§§ 7767 and 7771, Code of Iowa, 1939] and the diversion of water involved in the proposed project of petitioner, the executive council of the state of Iowa could not lawfully grant a permit for the erection of the dam proposed."

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tion required in some alternative form under state laws, as a basis for a state permit. Exhibits D and E, required by § 4.41 of the regulations, are to satisfy § 9(b) of the Federal Power Act and have to do especially with property rights in the use of water under the state laws and do not alter the legal situation presented by the Act itself. These exhibits are described as follows:

"*Exhibit D.*—Evidence that the applicant has complied with the requirements of the laws of the State or States within which the project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business, necessary to effect the purposes of the license applied for, including a certificate of convenience and necessity, if required. This evidence shall be accompanied by a statement of the steps that have been taken and the steps that remain to be taken to acquire franchise or other rights from States, counties, and municipalities before the project can be completed and put into operation.

"*Exhibit E.*—The nature, extent, and ownership of water rights which the applicant proposes to use in the development of the project covered by application, together with satisfactory evidence that the applicant has proceeded as far as practicable in perfecting its rights to use sufficient water for proper operation of the project works. A certificate from the proper State agency setting forth the extent and validity of the applicant's water rights shall be appended if practicable. In case the approval or permission of one or more State agencies is required by State law as a condition precedent to the applicant's right to take or use water for the operation of the project works, duly certified evidence of such approval or permission, or a showing of cause why such evidence cannot be reasonably submitted shall also be filed. When a State certificate is involved, one certified copy and three uncertified copies shall be submitted." Federal Power Commission Rules of Practice and Regulations, effective June 1, 1938, pp. 21-22.

Furthermore, the Executive Council, which includes the Governor of the State, on July 5, 1944, adopted a resolution directing the Attorney General of Iowa to intervene in this case before that court and "thereby take steps to sustain the said order of the Federal Power Commission [dismissing the petitioner's application for a federal license]" because "it is vital to the interests of the State of Iowa that the said order of the Commission be sustained." This demonstrates that the State of Iowa not only is opposed to the granting of a State permit but is opposed also to the granting of a federal license for the project. This opposition is based at least in part on the ground that the State statute, as interpreted by the State officials, expresses a policy opposed to the diversion of water from one stream to another in Iowa under such circumstances as the present.

Accepting this as the meaning of Section 7771 of the Iowa Code brings us to consideration of the effect of the Federal Power Act upon it and the related State statutes. We find that when that Act is read in the light of its long and colorful legislative history, it discloses both a vigorous determination of Congress to make progress with the development of the long idle water power resources of the nation and a determination to avoid unconstitutional invasion of the jurisdiction of the states. The solution reached is to apply the principle of the division of constitutional powers between the state and Federal Governments. This has resulted in a dual system involving the close integration of these powers rather than a dual system of futile duplication of two authorities over the same subject matter.

The Act leaves to the states their traditional jurisdiction subject to the admittedly superior right of the Federal Government, through Congress, to regulate interstate and foreign commerce, administer the public lands and reservations of the United States and, in certain cases, exercise authority under the treaties of the United States. These sources of constitutional authority are all applied in the Federal Power Act to the development of the navigable waters of the United States.[17]

[17] The Federal Government took its greatest step toward exercising its jurisdiction in this field by authorizing federal licenses, under the Federal Water Power Act of 1920 (41 Stat. 1063), for terms of 50 years for the development of water power in the navigable waters of the United States. That Act was limited in 1921 by the exclusion from it of water power projects in national parks or national monuments. 41 Stat. 1353. The Commission was reorganized so as to improve its administrative capacity in 1930. 46 Stat. 797. The Act was generally revised and perfected on

The closeness of the relationship of the Federal Government to these projects and its obvious concern in maintaining control over their engineering, economic and financial soundness is emphasized by such provisions as those of § 14 authorizing the Federal Government, at the expiration of a license, to take over the licensed project by payment of "the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken," plus an allowance for severance damages. The scope of the whole program has been further aided, in 1940, by the definition given to navigable waters of the United States in *United States* v. *Appalachian Power Co.*, 311 U. S. 377. "Students of our legal evolution know how this Court interpreted the commerce clause of the Constitution to lift navigable waters of the United States out of local controls and into the domain of federal control. *Gibbons* v. *Ogden*, 9 Wheat. 1, to *United States* v. *Appalachian Power Co.*, 311 U. S. 377." *Northwest Airlines* v. *Minnesota*, 322 U. S. 292, 303.

It was in the light of these developments that this petitioner, in April, 1941, made application for a federal license for this enlarged project. This project thus illustrates the kind of a development, in relation to interstate commerce and to the navigable waters of the United States, that is brought forth by the new recognition of its value when viewed from the comprehensive viewpoint of the Federal Power Commission. Until 1941, this enlarged project had remained dormant at least from the time

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August 26, 1935, 49 Stat. 803, when it received the name of the Federal Power Act. It was then made Part I of Title II of the Public Utility Act of 1935.

This last step was shortly after the decision of this Court in United States v. West Virginia, 295 U. S. 463, and it has served to clarify the law as it existed prior to that decision. Among other things this last step amended § 23 so as expressly to require a federal license for every water power project in the navigable waters of the United States. It also made mandatory, instead of discretionary, the filing with the Federal Power Commission of a declaration of intention by anyone intending to construct a project in such navigable waters over which Congress had jurisdiction under its authority to regulate commerce. It continued its recital of permission to construct such projects upon compliance with the state laws, rather than with the Federal Power Act, provided the projects were not in navigable waters of the United States, did not affect the interests of interstate or foreign commerce and did not affect the public lands or reservations of the United States. These amendments sharpened the line between the state and federal jurisdictions and helped to make it clear that the Federal Government was assuming responsibility through the Federal Power Commission for the granting of appropriate licenses for the development of water power resources in the navigable waters of the United States. See also the rapid development of federal projects shown in the Annual Reports of the Federal Power Commission 1921-1945.

when its value was recognized in the report to Congress filed by the War Department in 1920.[18]

Further light is thrown upon the meaning of the Federal Power Act by the statement, made by Representative William L. LaFollette of Washington, a member of the Special Committee on Water Power, which reported the bill which later became the Federal Water Power Act of 1920. In the debate which led to the insertion in § 9(b) of the reference to state laws as to the bed and banks of streams, he said:

> "The property rights are within the State. It can dispose of the beds, or parts of them, regardless of the riparian ownership of the banks, if it desires to, and that has been done in some States. If we put in this language, which is practically taken from that Supreme Court decision [*United States* v. *Cress*, 243 U. S. 316], as to the property rights of the States as to the bed and the banks and to the diversion of the water, then it is sure that we have not infringed any of the rights of the States in that respect, or any of their rules of property, and *we are trying in this bill above everything else to overcome a divided authority and pass a bill that will make it possible to get development.* We are earnestly trying not to infringe the rights of the States. If possible we want a bill that can not be defeated in the Supreme Court because of omissions, because of the lack of some provision that we should have put in the bill to safeguard the States." 56 Cong. Rec. 9810. (Italics supplied.)

As indicated by Representative LaFollette, Congress was concerned with overcoming the danger of divided authority so as to bring about the needed development of water power and also with the recognition of the constitutional rights of the states so as to sustain the validity of the Act. The resulting integration of the respective jurisdictions of the state and Federal Governments, is illustrated by the careful preservation of the separate interests of the states throughout the Act, without setting up a divided authority over any one subject.[19]

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[18] H. R. Doc. No. 134, 71st Cong., 2d Sess., reflecting the recommendations of the District Engineer, pp. 8-90; Division Engineer, p. 90; Mississippi River Commission, pp. 90-93; Board of Engineers for Rivers and Harbors, pp. 3-8; and the Chief of Engineers, pp. 1-3. See especially pp. 86, 87, 90.

[19] Instances of such provisions are the following: § 4(a) and (e), cooperation of the Commission with the executive departments and other agencies of the State and National Governments is required in the investigation of such subjects as the utilization of water resources, water power industry, location, capacity, development costs and the relation to markets of power sites, and the fair value of power. § 4(f), notice of application for a per-

Sections 27 and 9 are especially significant in this regard. Section 27 expressly "saves" certain state laws relating to property rights as to the use of water, so that these are not superseded by the terms of the Federal Power Act. It provides:

> "Sec. 27. That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." 41 Stat. 1077, 16 U. S. C. § 821.

Section 27 thus evidences the recognition by Congress of the need for an express "saving" clause in the Federal Power Act if the usual rules of supersedure are to be overcome. Sections 27 and 9(b) were both included in the original Federal Water Power Act of 1920 in their present form. The directness and clarity of § 27 as a "saving" clause and its location near the end of the Act emphasizes the distinction between its purpose and that of § 9(b) which is included in § 9, in the early part of the Act, which deals with the marshalling of information for the consideration of a new federal license. In view of the use by Congress of such an adequate "saving" clause in § 27, its failure to use similar language in § 9(b) is persuasive that § 9(b) should not be given the same effect as is given to § 27.

The effect of § 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. It therefore has primary, if not exclusive reference to such proprietary rights. The phrase "any vested right acquired therein" further emphasizes the application of the section to property rights. There is nothing in the paragraph to suggest a broader scope unless it be the words "other uses." Those words, however, are confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes. This was so held in an early decision by a District Court, relating to § 27 and upholding the constitutionality of the Act, where it was stated that "a proper construction of the act requires that the

liminary permit is to go to any State or municipality likely to be interested. § 7(a), in issuing permits and licenses preference is to be given to States and municipalities. § 10(e), licenses to States and municipalities under certain circumstances shall be issued and enjoyed without charge. § 14, a right is reserved not only to the United States but to any State or municipality to take over any licensed project at any time by condemnation and payment of just compensation. §§ 19 and 20, regulation of service and rates is preserved to the states.

words 'other uses' shall be construed ejusdem generis with the words 'irrigation' and 'municipal.'" *Alabama Power Co.* v. *Gulf Power Co.*, 283 Fed. 606, 619.

This section therefore is thoroughly consistent with the integration rather than the duplication of federal and state jurisdictions under the Federal Power Act. It strengthens the argument that, in those fields where rights are not thus "saved" to the states, Congress is willing to let the supersedure of the state laws by federal legislation take its natural course.[20]

Section 9(b)[21] does not resemble § 27. It must be read with § 9(a) and (c).[22] The entire section is devoted to securing adequate information for the Commission as to pending applications for licenses. Where § 9(a) calls for engineering and financial information, § 9(b) calls for legal information. This makes § 9(b) a natural place in which to describe the evidence which the Commission shall require in order to pass upon applications for federal licenses. This makes it a correspondingly unnatural place to establish by implication such a substantive policy as that contained in § 27 and which, in accordance with the contentions of the State

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[20] The legislative history of § 27 confirms these conclusions. The language is similar to that of § 8 of the Reclamation Act of 1902, 32 Stat. 390, 43 U. S. C. § 383, which provides, "nothing [in several listed sections] in this Act shall be construed as affecting or intended to affect or in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, ..."

This restricted clause, appeared in a modified and broader form in the Ferris Public Lands Bill of 1916, H. R. No. 408, 64th Cong., 1st Sess.:

"Sec. 13. That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State relating to the control, appropriation, use, or distribution of water."

It also had appeared as § 14 of the Ferris Bill of 1914, H. R. No. 16673, 63d Cong., 3d Sess., as follows:

"Section 14. That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired thereunder."

Discussion in Congress further emphasized the purely proprietary sense in which this language was used. 51 Cong. Rec. 13630-13631.

The clause reappeared in the Bill which became the Federal Water Power Act and was there enacted into the law in its present form. The use, in § 27 of the Federal Power Act, of language having a limited meaning in relation to proprietary rights under the reclamation law and in public land bills, carries that established meaning of the language into the Federal Power Act in the absence of anything in the Act calling for a different interpretation of the language.

[21] See note 6.

[22] See note 15.

of Iowa, would enable Chapter 363 of the Code of Iowa, 1939, to remain in effect although in conflict with the requirements of the Federal Power Act. There is nothing in the express language of § 9(b) that requires such a conclusion.

It does not itself require compliance with any state laws. Its reference to state laws is by way of suggestion to the Federal Power Commission of subjects as to which the Commission may wish some proof submitted to it of the applicant's progress. The evidence required is described merely as that which shall be "satisfactory" to the Commission. The need for compliance with applicable state laws, if any, arises not from this federal statute but from the effectiveness of the state statutes themselves.

When this application has been remanded to the Commission, that Commission will not act as a substitute for the local authorities having jurisdiction over such questions as the sufficiency of the legal title of the applicant to its riparian rights, or as to the validity of its local franchises, if any, relating to proposed intrastate public utility service. Section 9(b) says that the Commission may wish to have "satisfactory evidence" of the progress made by the applicant toward meeting local requirements but it does not say that the Commission is to assume responsibility for the legal sufficiency of the steps taken. The references made in § 9(b) to beds and banks of streams, to proprietary rights to divert or use water, or to legal rights to engage locally in the business of developing, transmitting and distributing power neither add anything to nor detract anything from the force of the local laws, if any, on those subjects. In so far as those laws have not been superseded by the Federal Power Act, they remain as applicable and effective as they were before its passage. The State of Iowa, however, has sought to sustain the applicability and validity of Chapter 363 of the Code of Iowa in this connection, on the ground that the Federal Power Act, by the implications of § 9(b), has recognized this chapter of Iowa law as part of a system of dual control of power project permits, cumbersome and complicated though it be. If it had been the wish of Congress to make the applicant obtain consent of state, as well as federal authorities, to each project, the simple thing would have been to so provide. In the course of the long debate on the legislation it was proposed at one time to provide for some such a consent in § 9(b).

For example, in the Shields Bill, S. No. 1419, 65th Cong., 2d Sess., in 1917, a proviso was proposed:

> "That before the permit shall be granted under this Act, the permittee must first obtain, in such manner as may be required by the laws of the States, *the consent of the State or States* in which the dam or other structure for the development of the water power is proposed to be constructed." (Italics supplied.)

This proviso was not enacted into law but it illustrates the concreteness with which the proposal was before Congress. In 1918, when Representative Mondell, of Wyoming, successfully defended the present language against amendment, he stated the purposes of § 9(b) as follows:

> "There are two controlling reasons for the insertion of this paragraph. The first, from the standpoint of water-power legislation, is that *the water power commission shall have the benefit of all of the information* which the States possess relative to the condition of water supply at the point of proposed diversion. That is a very important reason for a provision of this kind. . . . The second reason is so that the bill shall carry with it *notice to the commission that they must proceed in accordance with the State laws, which they must do in any event, whether the provision were in the bill or not.*" 56 Cong. Rec. 9813-9814. (Italics supplied.)

The purpose of this section as thus explained is consistent with the contention of the Commission in this case. It provides for presentation of information to the federal commission and protects the constitutional rights of the States. This explanation does not support the contention of the State of Iowa that § 9(b) amounts to the subjection of the federal license to requirements of the state law on the same subject. The inappropriateness of such an interpretation is apparent in the light of the circumstances which culminated in the passage of the Federal Water Power Act in 1920. The purposes of the Act were then so generally known as to have made such a restrictive interpretation impossible and a denial of it unnecessary. It was the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so, instead of the piecemeal, restrictive, negative approach of the River and Harbor Acts and other federal laws previously enacted.

It was a major undertaking involving a major change of national policy.[23] That it was the intention of Congress to secure

[23] The nation-wide drive for the passage of this legislation dates back at least to the administration of Theodore Roosevelt and to the enthusiastic

a comprehensive development of national resources and not merely to prevent obstructions to navigation is apparent from the provisions of the Act, the statutory scheme of which has been several times reviewed and approved by the courts.[24]

The detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls.[25] The contention of the State of Iowa is comparable to that which was presented on behalf of 41 States and rejected by this Court in *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 404-405, 426-427, where this Court said:

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support of "the conservationists" led by Gifford Pinchot, as Chief of the Division of Forestry.

"With all its faults the Federal Water Power Act of 1920 marked a great advance. It established firmly the principle of federal regulation of water power projects, limited licenses to not more than fifty years, and provided for Government recapture of the power at the end of the franchise.

"For the first time, the Act of 1920 established a national policy in the use and development of water power on public lands and navigable streams. . . . ." Pinchot, The Long Struggle for Effective Federal Water Power Legislation (1945), 14 Geo. Wash. L. Rev. 9, 19. See also, Kerwin, Federal Water Power Legislation, c. VI.

The present Act was distinctly an effort to provide federal control over and give federal encouragement to water power development. It grew out of a bill prepared by the Secretaries of War, Interior and Agriculture. It was recommended by a Special Committee on Water Power created in the House of Representatives at the suggestion of President Wilson. See Statement by Representative Sims, Chairman of the Committee on Water Power, 56 Cong. Rec. 9797-9798. The bill was to provide "a method by which the water powers of the country, wherever located, can be developed by public or private agencies under conditions which will give the necessary security to the capital invested and at the same time protect and preserve every legitimate public interest. . . . The problems are national, rather than local; they transcend state lines and cannot be handled adequately except by or in conjunction with national agencies." Statement by David F. Houston, Secretary of Agriculture, quoted in H. R. Rep. No. 61, 66th Cong., 1st Sess., p. 5.

[24] New Jersey v. Sargent, 269 U. S. 328; United States v. Appalachian Electric Power Co., 311 U. S. 377; Clarion River Power Co. v. Smith, 59 F. 2d 861, certiorari denied, 287 U. S. 639; Alabama Power Co. v. McNinch, 94 F. 2d 601; Pennsylvania Water & Power Co. v. Federal Power Commission, 123 F. 2d 155, certiorari denied, 315 U. S. 806; Alabama Power Co. v. Federal Power Commission, 128 F. 2d 280, certiorari denied, 317 U. S. 652; Puget Sound Power & Light Co. v. Federal Power Commission, 137 F. 2d 701; Wisconsin Public Service Corp. v. Federal Power Commission, 147 F. 2d 743, certiorari denied, 325 U. S. 880; Georgia Power Co. v. Federal Power Commission, 152 F. 2d 908.

[25] Sections 4(e) and 10(a), comprehensive plans required; §§ 4(f) and 5, preliminary permits; § 4(g), investigation of power resources; § 6, license term of 50 years; § 7(a) development of water resources on a national basis; § 7(b), developments by the United States itself; § 13, prompt construction required; § 14, recapture of projects and payment for them by the Government upon expiration of licenses, thus giving the Government a direct interest in and reason for control of every feature of each licensed project; § 21, federal powers of condemnation vested in licensee; and § 28, prohibition of amendment or repeal of licenses.

"The states possess control of the waters within their borders, 'subject to the acknowledged jurisdiction of the United States under the Constitution in regard to commerce and the navigation of the waters of rivers.' It is this subordinate local control that, even as to navigable rivers, creates between the respective governments a contrariety of interests relating to the regulation and protection of waters through licenses, the operation of structures and the acquisition of projects at the end of the license term. But there is no doubt that the United States possesses the power to control the erection of structures in navigable waters.

"The point is that navigable waters are subject to national planning and control in the broad regulation of commerce granted the Federal Government. The license conditions to which objection is made have an obvious relationship to the exercise of the commerce power. Even if there were no such relationship the plenary power of Congress over navigable waters would empower it to deny the privilege of constructing an obstruction in those waters. It may likewise grant the privilege on terms. It is no objection to the terms and to the exertion of the power that 'its exercise is attended by the same incidents which attend the exercise of the police power of the states.' The Congressional authority under the commerce clause is complete unless limited by the Fifth Amendment."

It is the Federal Power Commission rather than the Iowa Executive Council that under our constitutional Government must pass upon these issues on behalf of the people of Iowa as well as on behalf of all others.

We accordingly reverse the judgment of the court below with directions to remand the case to the Federal Power Commission for further proceedings in conformity with this opinion.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

Mr. Justice FRANKFURTER dissenting.

This case does not present one of those large constitutional issues which, because they are so largely abstract, have throughout its history so often divided the Court. The controversy, as I understand it, is concerned with the proper administration of a law in which Congress has recognized the interests of the States as well as of the United States and has entrusted the proper adjust-

ment of these nation-State relations to the interrelated functions of the Federal Power Commission and the courts.

We are all agreed that Congress has the constitutional power to promote a comprehensive development of the nation's water resources and that it has exercised its authority by the Federal Power Act. 41 Stat. 1063, 49 Stat. 838; 16 U. S. C. §§ 791(a) *et seq.* See *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53; *New Jersey* v. *Sargent*, 269 U. S. 328; *United States* v. *Appalachian Power Co.*, 311 U. S. 377. And in view of Congress' power, of course, this enactment overrides all State legislation in conflict with it. But the national policy for water power development formulated by the Federal Power Act explicitly recognizes regard for certain interests of the States as part of that national policy. This does not imply that general, uncritical notions about so-called "States' rights" are to be read into what Congress has written. It does mean that we must adhere to the express Congressional mandate that the public interest which underlies the Federal Power Act involves the protection of particular matters of intimate concern to the people of the States in which proposed projects requiring the sanction of the Federal Power Commission are to be located. By § 9(b) of the Act, 41 Stat. 1063, 1068; 16 U. S. C. § 802(b),[1] Congress explicitly required that before the Commission can issue a license for the construction of a hydro-electric development, such as the proposed project of the petitioner, the Commission must have "satisfactory evidence that the applicant has complied with the requirements of the laws of the State" in reference to the matters enumerated.

Whether the Commission has such "satisfactory evidence" necessarily depends upon what the requirements of State law are. In turn, what the requirements of State law are often depends upon the appropriate but unsettled construction of State law. And so, the Commission may well be confronted, as it was in this case, with the necessity of determining what the State law requires before it can determine whether the applicant has satisfied it, and, therefore, whether the condition for exercising the Commission's power has been fulfilled.

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[1] "Sec. 9. That each applicant for a license hereunder shall submit to the commission . . .

(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act."

To safeguard the interests of the States thus protected by § 9(b), Congress has directed that notice be given to the State when an application has been filed for a license, the granting of which may especially affect a State. § 4(f), 49 Stat. 838, 841; 16 U. S. C. § 797(f). If a State does not challenge the claim of an applicant, the evidence submitted by the applicant, if found to be satisfactory by the Commission, has met the demands of § 9(b), and a State cannot thereafter challenge the Commission's determination. But a real problem in administration is presented to the Power Commission when a State does intervene and claims that the applicant has not complied with its lawful requirements. For, before the Commission can meet the duty placed on it by § 9(b), it must ascertain the scope and meaning of the State laws. Suppose the State law is not clear or is susceptible of different constructions and has received no construction by the only authoritative source for the interpretation of State laws, namely, the highest court of the State. Must the Federal Power Commission give an independent interpretation of the laws of the State? This is not to suggest an unreal or hypothetical situation. The Federal Power Commission submitted here a compilation of laws relating to State requirements relevant under § 9(b) for not less than thirty States. Are the lawyers of the Commission to make themselves the originating interpreters of the laws of these States? Are they to construe, for instance, the laws of New Jersey and Oklahoma and Arizona and Illinois when the courts of those States have not spoken? And if they do and the State appeals from the decision, must the Court of Appeals for the District of Columbia become the interpreter of these various laws? Finally, in the event of a further appellate review is this Court to construe State legislation without guidance by the State courts? Time out of mind, and in a variety of situations, this Court has admonished against the avoidable assumption by this Court of the independent construction of State legislation. See, *e. g.*, *Gilchrist* v. *Interborough Co.*, 279 U. S. 159, 207-209; Brandeis, J., dissenting, in *R. R. Comm'n* v. *Los Angeles R. Co.*, 280 U. S. 145, 158, 164-66. It is pertinent to recall the classic statement of the reason for leaving to the controlling interpretation of local courts the meaning of local law: "to one brought up within it, varying emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life, may give to the different parts wholly new values that logic and grammar never could have got from the books." *Diaz* v. *Gonzalez*, 261 U. S. 102, 106. If it has been deemed unwise to throw upon this Court

the burden of construing local legislation when the construction could by appropriate procedure be had from the States, it seems odd that we should reject this as a rule of administration adopted by the Power Commission.

That is all that the Commission has done in this case. It has said, in effect: "We do not know what the Iowa law demands of the applicant. Iowa has a right to make certain demands under § 9(b) and until they are met we are not empowered to grant a license to the applicant. But we cannot tell whether they have been met, because the meaning of the Iowa statutes has not been determined, as it easily can be determined, by an appropriate action in the Iowa courts. Only after such an authoritative pronouncement can we know what our obligation under the statute may be." The Court of Appeals for the District of Columbia thought that such procedure made sense. It seems to have said: "The Commission doesn't know what the Iowa law requires, and neither do we. For we cannot tell what it requires until the Iowa Supreme Court tells us what it requires. And an adjudication of that issue can be readily secured if the applicant will proceed along the easy path provided by Iowa for obtaining such an adjudication." 151 F. 2d 20. See Iowa Laws, 1943, c. 278, § 306 and *Lloyd* v. *Ramsay*, 192 Iowa 103, 116-17. Even we cannot construe the requirements of Iowa law in the absence of a determination by the Iowa Supreme Court. And in much more conventional types of litigation we have evolved the procedure whereby federal litigation is stayed until the State law is authoritatively determined by a State court. *E. g.*, *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496; *Spector Motor Co.* v. *McLaughlin*, 323 U. S. 101; *A. F. of L.* v. *Watson*, March 25, 1946.

What reason of policy is there for not approving this mode of adjusting interests that involve a regard for both federal and State enactments? The Federal Power Commission which devised this procedure has not been an unzealous guardian of the national interests. *E. g.*, *F. P. C.* v. *Natural Gas Pipeline Co.*, 315 U. S. 575; *F. P. C.* v. *Hope Natural Gas Co.*, 320 U. S. 591.

It is no answer to suggest that the Attorney-General of Iowa at the bar of this Court expressed a view of the Iowa statute which would make obedience to it needless because of conflict with the provisions of the Federal Power Act. The Attorney-General is not the judicial organ of the State of Iowa. This Court does not always take the interpretation by the Attorney-General of the United States of a federal statute. It should not take the view of the

Attorney-General of Iowa as authoritative on a statute not construed by the Supreme Court of Iowa when we are called upon to make the adjustment in federal-State relations which Congress has enjoined in § 9(b). After all, advocates, including advocates for States, are like managers of pugilistic and election contestants in that they have a propensity for claiming everything. Before conflict can be found between federal and State legislation, construction must be given the State legislation. Avoidance of conflict is itself an important factor relevant to construction. And so, construction of State legislation relating to the matters dealt with in the Federal Power Act is subtle business and a subtlety peculiarly within the duty, skill, and understanding of State judges.

If it be said that the procedure for which the Federal Power Commission contends may take time, there is no assurance that a contested case like this will not take just as much time. The Commission must pass independently on an unconstrued State statute; its construction may then come before the Court of Appeals for the District and eventually before this Court. Even then the possibility remains that this Court's decision will be followed by one in the State court ruling, as has not been unknown, that this Court's interpretation was in error. In any event, mere speed is not a test of justice. Deliberate speed is. Deliberate speed takes time. But it is time well spent.

With due respect, I have not been able to discover an adequate answer to the position of the Federal Power Commission, thus summarized in the Solicitor-General's brief:

> "Unless Section 9(b) is to be given no effect whatever, some evidence of compliance with at least some state laws is a prerequisite to the issuance of a federal license, and the view of the court below, that there is no occasion, in this case, to anticipate conflicts between state and federal authority and the consequent invalidity of the state law, is not an unreasonable one. 'To predetermine, ever in the limited field of water power, the rights of different sovereignties, pregnant with future controversies, is beyond the judicial function.' *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, 423. Here petitioner, since the modification of its plans, has given the State Executive Council and the Iowa courts no opportunity to express their views on its proposed project with reference to matters which may be peculiarly of local concern; without such an expression, it is difficult to assess the propriety of what is only an anticipated exercise of the State's power."

Accordingly, I think that the judgment should be affirmed.